INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT OF 1994

HEARING

BEFORE THE

SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

H.R. 4781

TO FACILITATE OBTAINING FOREIGN-LOCATED ANTITRUST EVIDENCE BY AUTHORIZING THE ATTORNEY GENERAL OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION TO PROVIDE, IN ACCORDANCE WITH ANTITRUST MUTUAL ASSISTANCE AGREEMENTS, ANTITRUST EVIDENCE TO FOREIGN ANTITRUST AUTHORITIES ON A RECIPROCAL BASIS; AND FOR OTHER PURPOSES

AUGUST 8, 1994

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INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT OF 1994

MONDAY, AUGUST 8, 1994

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:30 p.m., in room 2141, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Patricia Schroeder, Robert C. Scott, Hamilton Fish, Jr., Charles T. Canady, and Bob Goodlatte.

Subcommittee staff present: Cynthia W. Meadow, counsel; George P. Slover, assistant counsel; Perry Apelbaum, assistant counsel; Catherine S. Cash, research assistant; Deloris L. Cole, office manager; full committee staff present: Jonathan R. Yarowsky, general counsel; Bob Lembo, counsel/administrator; Alan F. Coffey, Jr., minority chief counsel; and Charles E. Kern II, minority counsel.

OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. BROOKS. The committee will come to order.

This afternoon the subcommittee considers the bill H.R. 4781, the International Antitrust Enforcement Assistance Act of 1994, which I introduced, joined by my good friend and colleague, Congressman Fish. The bill would authorize the Justice Department to enter into reciprocal written agreements with foreign antitrust authorities for the purpose of cooperating in international antitrust investigations.

Foreign antitrust enforcement has suffered for the past 15 years—as the hollow slogan of free trade took hold in the early 1980's, conveniently forgetting that "free trade" without "fair trade" is meaningless.

I am proud to say that due to the efforts of Jim Rill in the later years of the past administration, foreign antitrust enforcement was finally put back on the radar screen. The volume wasn't too good. And building upon those efforts, the current antitrust chief, Anne Bingaman, has been stellar in her efforts to strike hard against foreign cartel activity.

The list of the Department of Justice's achievements in this area is notable. On May 26, 1994, the DOJ acted against anticompetitive license arrangement by a British glass manufacturer. On June 9, the DOJ—in cooperation with Canadian officials—broke up a

price-fixing conspiracy in the $100-million-a-year plastic dinnerware industry. A month later, on July 14, the United States and Canada, again working together, broke up a $120-million-a-year international cartel run by Japanese firms in thermal fax paper.

But these actions were consummated in large part because of the rare enforcement relationship that exists with a few of our closest allies, like Canada and Great Britain. Unfortunately, there is no formalized structure outside of treaties to extend to certain antitrust problems experienced with many other nations.

This legislation will take an important first step in bridging that unfortunate gap, where foreign cartels can operate with impunity on our shores because possibly incriminating documents and other evidence are neatly stowed away in inaccessible file drawers in their home countries.

By authorizing reciprocal assistance agreements with foreign antitrust enforcers, H.R. 4781 would make it much harder for foreign cartels to find a safe haven. The legislation has bipartisan support in both the House and Senate, as well as broad support within the business community and the antitrust bar.

[The bill, H.R. 4881 follows:]

I

103D CONGRESS
2D SESSION

H. R. 4781

To facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with antitrust mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis; and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 19, 1994

Mr. BROOKS (for himself and Mr. FISH) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with antitrust mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "International Antitrust Enforcement Assistance Act of 1994".

SEC. 2. DISCLOSURE TO A FOREIGN ANTITRUST AUTHORITY OF ANTITRUST EVIDENCE.

Subject to section 8 and except as provided in section 5, the Attorney General of the United States and the Federal Trade Commission may provide, in accordance with an antitrust mutual assistance agreement in effect with a foreign antitrust authority, antitrust evidence to the foreign antitrust authority to assist the foreign antitrust authority—

(1) to determine whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or

(2) to enforce any of such foreign antitrust laws.

SEC. 3. INVESTIGATIONS TO ASSIST A FOREIGN ANTITRUST AUTHORITY IN OBTAINING ANTITRUST EVIDENCE.

(a) GENERAL AUTHORITY.—In accordance with an antitrust mutual assistance agreement in effect with a foreign antitrust authority, subject to section 8, and except as provided in section 5, the Attorney General may, using the authority of the Attorney General to investigate possible violations of the Federal antitrust laws, conduct investigations to obtain antitrust evidence relating to a violation of the foreign antitrust laws administered or en-

forced by the foreign antitrust authority, and may provide such antitrust evidence to the foreign antitrust authority, to assist the foreign antitrust authority—

(1) to determine whether a person has violated or is about to violate any of such foreign antitrust laws, or

(2) to enforce any of such foreign antitrust laws.

Such investigations may be conducted, and such antitrust evidence may be provided, without regard to whether the conduct investigated violates any of the Federal antitrust laws.

(b) CONFORMING AMENDMENTS.—The Antitrust Civil Process Act (15 U.S.C. 1311 et seq.) is amended—

(1) in section 2—

(A) in subsection (d)—

(i) by striking "or any" and inserting ", any", and

(ii) by inserting before the period ", or any of the foreign antitrust laws", and

(B) by adding at the end the following:

"(k) The term 'foreign antitrust laws' has the meaning given such term in section 12 of the International Antitrust Enforcement Assistance Act of 1994.", and

(2) in the first sentence of section 3(a)—

(A) by inserting "or to an investigation authorized by section 3(a) of the International Antitrust Enforcement Assistance Act of 1994" after "investigation", and

(B) by inserting "by the United States" after "proceeding".

SEC. 4. JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES.

(a) AUTHORITY OF THE DISTRICT COURTS.—On the application of the Attorney General made in accordance with an antitrust mutual assistance agreement in effect with a foreign antitrust authority, the United States district court for the district in which a person resides, is found, or transacts business may order such person to give testimony or a statement, or to produce a document or other thing, to the Attorney General to assist the foreign antitrust authority that is a party to such agreement—

(1) to determine whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or

(2) to enforce any of such foreign antitrust laws.

(b) CONTENTS OF ORDER.—(1) An order issued under subsection (a) may direct that testimony or a state-

ment be given, or a document or other thing be produced, to a person who shall be recommended by the Attorney General and appointed by the court. A person so appointed shall have power to administer any necessary oath and to take such testimony or such statement.

(2) An order issued under subsection (a) may prescribe the practice and procedure for taking testimony and statements. Such practice and procedure may be in whole or in part the practice and procedure of the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority with respect to which the Attorney General requests such order. To the extent such order does not prescribe otherwise, any testimony and statements required to be taken shall be taken, and any documents and other things required to be produced shall be produced, in accordance with the Federal Rules of Civil Procedure.

(c) RIGHTS AND PRIVILEGES PRESERVED.—A person may not be compelled under an order issued under subsection (a) to give testimony or a statement, or to produce a document or other thing, in violation of any legally applicable right or privilege.

(d) VOLUNTARY CONDUCT.—This section does not preclude a person in the United States from voluntarily giving testimony or a statement, or producing a document

or other thing, in any manner acceptable to such person for use in an investigation by a foreign antitrust authority.

SEC. 5. LIMITATIONS ON AUTHORITY.

Sections 2, 3, and 4 shall not apply with respect to the following antitrust evidence:

(1) Antitrust evidence that is received by the Attorney General or the Commission under section 7A of the Clayton Act (15 U.S.C. 18a), as added by title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Nothing in this paragraph shall affect the ability of the Attorney General or the Commission to disclose to a foreign antitrust authority antitrust evidence that is obtained otherwise than under such section 7A.

(2) Antitrust evidence that is matter occurring before a grand jury and with respect to which disclosure is prevented by Federal law, except that for purposes of this section and Rule 6(e)(3)(c)(i) of the Federal Rules of Criminal Procedure, a judicial proceeding includes a judicial or administrative proceeding of a foreign state or a regional economic integration organization under any of the foreign antitrust laws of such foreign state or such organization.

(3) Antitrust evidence that is specifically authorized under criteria established by Executive

Order 12356, or any successor to such order, to be kept secret in the interest of national defense or foreign policy, and—

(A) that is classified pursuant to such order or such successor, or

(B) with respect to which a determination of classification is pending under such order or such successor.

(4) Antitrust evidence that is classified under section 142 of the Atomic Energy Act of 1954 (42 U.S.C. 2162).

SEC. 6. DISCLOSURE OF ANTITRUST EVIDENCE OBTAINED UNDER THE ANTITRUST CIVIL PROCESS ACT.

Section 4 of the Antitrust Civil Process Act (15 U.S.C. 1313) shall not apply to prevent the Attorney General from providing to a foreign antitrust authority antitrust evidence in accordance with an antitrust mutual assistance agreement in effect under this Act and in accordance with the other requirements of this Act.

SEC. 7. PUBLICATION REQUIREMENTS APPLICABLE TO ANTITRUST MUTUAL ASSISTANCE AGREEMENTS.

(a) PUBLICATION OF PROPOSED ANTITRUST MUTUAL ASSISTANCE AGREEMENTS.—Not less than 45 days before entering into an antitrust mutual assistance agree-

ment and after consultation with the Commission, the Attorney General shall publish in the Federal Register—

(1) the proposed text of such agreement and any modification to such proposed text, and

(2) a request for public comment with respect to such text or such modification, as the case may be.

(b) PUBLICATION OF PROPOSED AMENDMENTS TO ANTITRUST MUTUAL ASSISTANCE AGREEMENTS IN EFFECT.—Not less than 45 days before entering into an agreement that makes an amendment to an antitrust mutual assistance agreement in effect under this Act and after consultation with the Commission, the Attorney General shall publish in the Federal Register—

(1) the proposed text of such amendment, and

(2) a request for public comment with respect to such amendment.

(c) PUBLICATION OF ANTITRUST MUTUAL ASSISTANCE AGREEMENTS ENTERED INTO AND OF AMENDMENTS TO SUCH AGREEMENTS.—Not later than 30 days after entering into an antitrust mutual assistance agreement, or an agreement that makes an amendment to an antitrust mutual assistance agreement in effect under this Act, the Attorney General shall publish in the Federal Register—

(1) the text of the antitrust mutual assistance agreement or of such amendment, as the case may be, and

(2) in the case of an agreement that makes such amendment, a notice containing—

(A) a statement of the fact that such agreement was entered into,

(B) citations to the provisions of the Federal Register that contain the text of the amendment and of the antitrust mutual assistance agreement that is so amended, and

(C) a description of the manner in which a copy of the antitrust mutual assistance agreement, as so amended, may be obtained from the Attorney General.

(d) CONDITION FOR VALIDITY.—An antitrust mutual assistance agreement, or an agreement that makes an amendment to an antitrust mutual assistance agreement, entered into in violation of subsection (a) or (b) shall not be considered to be entered into under the authority of this Act.

SEC. 8. IMPLEMENTATION OF ANTITRUST MUTUAL ASSISTANCE AGREEMENTS.

(a) DETERMINATIONS.—The Attorney General may conduct an investigation under section 3, and the Attorney

General or the Commission may provide antitrust evidence to a foreign antitrust authority, under an antitrust mutual assistance agreement in effect under this Act only if the Attorney General or the Commission, as the case may be, determines in the particular instance in which such investigation or evidence is requested that—

(1) the foreign antitrust authority—

(A) will satisfy the assurances, terms, and conditions required by subparagraphs (A), (B), and (D) of section 12(2), and

(B) is capable of complying with and will comply with the confidentiality requirements applicable under such agreement to the requested antitrust evidence,

(2) providing the requested antitrust evidence will not violate section 5, and

(3) conducting such investigation, or providing the requested antitrust evidence, as the case may be, is consistent with the public interest of the United States, taking into consideration, among other factors, whether the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority holds any proprietary interest that could benefit or otherwise be affected by

such investigation or by the provision of such antitrust evidence.

(b) LIMITATION ON DISCLOSURE OF CERTAIN ANTITRUST EVIDENCE.—Neither the Attorney General nor the Commission may disclose in violation of an antitrust mutual assistance agreement any antitrust evidence received under such agreement, except that such agreement may not prevent the disclosure of such antitrust evidence to a defendant in an action or proceeding brought by the Attorney General or the Commission for a violation of any of the Federal antitrust laws if such disclosure would otherwise be required by Federal law.

(c) REQUIRED DISCLOSURE OF NOTICE RECEIVED.—If the Attorney General or the Commission receives a notice described in section 12(2)(G), the Attorney General or the Commission, as the case may be, shall transmit such notice to the person that provided the evidence with respect to which such notice is received.

SEC. 9. LIMITATIONS ON JUDICIAL REVIEW.

(a) PUBLICATION.—Determinations made under section 8(a) shall not be subject to judicial review.

(b) CITATIONS TO AND DESCRIPTIONS OF ANTITRUST LAWS.—Whether an antitrust mutual assistance agreement satisfies the requirements specified in section 12(2)(C) shall not be subject to judicial review.

SEC. 10. SUPPLEMENTATION AND PRESERVATION OF AUTHORITY.

(a) SUPPLEMENTAL AUTHORITY.—The authority provided by this Act is in addition to, and not in lieu of, any other authority vested in the Attorney General, the Commission, or any other officer of the United States.

(b) AUTHORITY PRESERVED.—This Act does not modify or affect the allocation of responsibility between the Attorney General and the Commission for the enforcement of the Federal antitrust laws.

SEC. 11. REPORT TO THE CONGRESS.

In the 30-day period beginning 3 years after the date of the enactment of this Act and after consultation with the Commission, the Attorney General shall submit, to the Speaker of the House of Representatives and the President pro tempore of the Senate, a report—

(1) describing how the operation of this Act has affected the enforcement of the Federal antitrust laws,

(2) the extent to which foreign antitrust authorities have complied with the confidentiality requirements applicable under antitrust mutual assistance agreements in effect under this Act,

(3) the number and identities of the foreign antitrust authorities that have entered into such agreements,

(4) the identity of each foreign state, and each regional economic integration organization, that has in effect a law similar to this Act,

(5) the approximate number of requests made by the Attorney General and the Commission under such agreements to foreign antitrust authorities for antitrust investigations and for antitrust evidence,

(6) the approximate number of requests made by foreign antitrust authorities under such agreements to the Attorney General and the Commission for investigations under section 3 and for antitrust evidence, and

(7) a description of any significant problems or concerns of which the Attorney General is aware with respect to the operation of this Act.

SEC. 12. DEFINITIONS.

For purposes of this Act:

(1) The term "antitrust evidence" means information, testimony, statements, documents, or other things obtained in anticipation of, or during the course of, an investigation or proceeding under any of the Federal antitrust laws or any of the foreign antitrust laws.

(2) The term "antitrust mutual assistance agreement" means a written agreement, or written

memorandum of understanding, that is entered between the Attorney General and a foreign antitrust authority for the purpose of conducting investigations under section 3, or for providing antitrust evidence, on a reciprocal basis and that includes the following:

(A) An assurance that the foreign antitrust authority will provide to the Attorney General or the Commission assistance that is comparable in scope to the assistance the Attorney General or the Commission, as the case may be, provides under such agreement or such memorandum.

(B) An assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain the confidentiality of antitrust evidence that may be received under section 2, 3, or 4 and will give protection to antitrust evidence received under such section that is not less than the protection provided under the laws of the United States to such antitrust evidence.

(C) Citations to, and brief descriptions of, the laws (including treaties, statutes, executive orders, and regulations) of the United States,

and the laws (including treaties, statutes, executive orders, and regulations) of the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority, that protect the confidentiality of antitrust evidence that may be provided under such agreement or such memorandum. Such citations and such descriptions shall include the enforcement mechanisms and penalties applicable under such laws.

(D) Terms and conditions that specifically prohibit using antitrust evidence received under such agreement or such memorandum, for any purpose other than the administration or enforcement of the foreign antitrust laws involved.

(E) An assurance that antitrust evidence received under section 2, 3, or 4 from the Attorney General or the Commission, and all copies of such evidence, in the possession or control of the foreign antitrust authority will be returned to the Attorney General or the Commission, respectively, at the conclusion of the foreign investigation or proceeding with respect to which such evidence was so received.

(F) Terms and conditions that specifically provide that such agreement or such memorandum will be terminated if—

(i) the confidentiality required under such agreement or such memorandum is violated with respect to antitrust evidence, and

(ii) adequate action is not taken both to minimize any harm resulting from the violation and to ensure that such confidentiality is not violated again.

(G) Terms and conditions that specifically provide that if the confidentiality required under such agreement or such memorandum is violated by the foreign antitrust authority with respect to antitrust evidence, notice of the violation will be given—

(i) by the foreign antitrust authority promptly to the Attorney General or the Commission with respect to antitrust evidence provided by the Attorney General or the Commission, respectively, and

(ii) by the Attorney General or the Commission to the person (if any) that

provided such evidence to the Attorney General or the Commission.

(3) The term "Attorney General" means the Attorney General of the United States.

(4) The term "Commission" means the Federal Trade Commission.

(5) The term "Federal antitrust laws" has the meaning given the term "antitrust laws" in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)) but also includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

(6) The term "foreign antitrust authority" means a governmental entity of a foreign state or of a regional economic integration organization that is vested by such state or such organization with authority to enforce the foreign antitrust laws of such state or such organization.

(7) The term "foreign antitrust laws" means the laws of a foreign state, or of a regional economic integration organization, that are substantially similar to any of the Federal antitrust laws and that prohibit conduct similar to conduct prohibited under the Federal antitrust laws.

(8) The term "person" has the meaning given such term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

(9) The term "regional economic integration organization" means an organization that is constituted by, and composed of, foreign states and in which such foreign states have vested authority to make decisions binding on such foreign states.

○

Mrs. BROOKS. Today we will have the pleasure of hearing from the Honorable Anne Bingaman, Assistant Attorney General for Antitrust. She will be followed by a panel of distinguished members of the antitrust bar.

We welcome all of you.

I will now recognize the distinguished ranking minority member, Mr. Fish.

Mr. FISH. Thank you, Mr. Chairman. The International Antitrust Enforcement Assistance Act of 1994, H.R. 4781, is already an example of bipartisan cooperation. The process leading up to the introduction of this legislation in both the House of Representatives and the Senate reflects a desire on the part of the Antitrust Division to work with Members on both sides of the aisle, and Assistant Attorney General Anne Bingaman deserves to be commended for this approach. It is certainly my intention to continue this cooperation as we move through the various stages of the legislative process.

Simply put, this legislation is about effective international antitrust enforcement. Enforcing the antitrust laws is always a complicated, fact-based business—and the limitations of U.S. discovery procedures with respect to foreign nationals and foreign companies pose basic evidentiary problems. Because we are in a global marketplace, this evidence is increasingly located abroad. No company that does business in the United States should be permitted to escape U.S. antitrust liability simply by maintaining its business records in a foreign jurisdiction.

The bill also attempts to balance these very important enforcement goals with business confidentiality concerns. We have made a good start on confidentiality but more may need to be done. In my judgment, we need to ensure that the proprietary rights of American businesses are protected. The confidentiality aspects of this legislation are very important to me and I intend to work to ensure that American companies are not unfairly disadvantaged by the procedures established under this legislation.

For example, questions have been raised about the impact of H.R. 4781 on the Export Trading Company Act and the possible use of the Civil Investigative Demand, CID, mechanism as a way around the exemption language with respect to Hart-Scott-Rodino material. Others are concerned about the strict limitations on judicial review. Also, we need to understand fully how and why this measure changes the Antitrust Civil Process Act. In addition, there is the concern about the liability of U.S. citizens abroad, based upon their testimony in Federal court proceedings under grants of immunity under U.S. law. Each of these items, Mr. Chairman, needs to be studied by the subcommittee. We must ensure that the very important enforcement goals of this legislation and the confidentiality rights of American businesses are fairly balanced.

I look forward to continue to working with you, Mr. Chairman, and Assistant Attorney General Anne Bingaman and her excellent staff on this very important legislation.

Thank you.

Mr. BROOKS. I would like to observe the presence of Mrs. Schroeder and Bobby Scott.

This afternoon, our first witness is the Honorable Anne K. Bingaman, Assistant Attorney General for the Antitrust Division. In formulating the bill's language, Ms. Bingaman and her team have worked diligently with us, and I deeply appreciate her help.

In the interest of time I would ask that you summarize your statement in about 5 minutes. Your prepared statement will be part of the printed record.

Without objection, the hearing record will remain open to receive written testimony from the persons who have requested their statements be made a part of the printed record.

Ms. Bingaman, thank you again for being with us this afternoon. You may begin.

STATEMENT OF ANNE K. BINGAMAN, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Ms. BINGAMAN. Thank you so much, Mr. Chairman. Thank you, Congressman Fish.

Mr. Chairman, it is a great honor to be here today, and it is a great honor to be here with you, Congressman Fish. We deeply appreciate the bipartisan support we have had from you, Mr. Chairman and Congressman Fish. And I am happy to say we've had bipartisan support on the Senate side as well; we had five Democrats and four Republicans as the original sponsors of this legislation.

I think what the bipartisan support for this shows is a couple of things. Number one, we have had an extensive and constructive dialogue with the business community, with the bar, with leaders of organizations. Number two, we have all worked hard to craft a bill which meets the very serious law enforcement goals that this bill is designed to help us achieve, and at the same time protects the legitimate concerns of American businesses about the confidentiality of their documents.

We have worked for weeks to strike the balance that this bill strikes. And we are comfortable with it.

Let me say also that we appreciate very deeply the leadership and support that Mr. Jim Rill, my predecessor in this job in the Bush administration, who was a leader in international antitrust enforcement when he served in this role, has given us. He has served as chair of a special task force of the American Bar Association. He is the author of a 23-page report which I believe the subcommittee has on this. And he will testify later to the subcommittee on his views as to the need for this bill and based on his own experience in the job and as a practitioner.

The needs are really obvious, as the chairman and Congressman Fish noted. We live in a global economy. A quarter of U.S. gross domestic product is now accounted for by export and import trade. And yet it is difficult if not impossible for U.S. antitrust authorities to reach the documents in foreign files which are so critical to enforce the laws for this fully a quarter of our national economy.

And so the tools that this bill contains would allow us to cooperate with foreign governments in order to get their cooperation back. That is the crucial point, this bill allows us to get documents in evidence we cannot obtain any other way, except through cooperation,

because the reality of national sovereignty, the difficulty, if not impossibility, of serving foreign subpoenas or obtaining witnesses abroad means that we have to be able to give something. We have to cooperate in order to get something.

It is a simple fact that U.S. antitrust enforcement is the most active in the world. Our laws are the broadest in the world. And the United States and law enforcement in the United States stands to gain greatly from this bill. It is for the good of the American people. It is for the good of the American economy. It is for exports, for jobs, and to keep consumer prices down from international price-fixing cartels that this bill is needed.

So I deeply appreciate the leadership shown by the chairman and Congressman Fish in introducing this bill. I would like to answer any and all questions that I can. I understand there may be some, and I will be very glad to state absolutely anything I can about it.

We are most concerned that this legislation be passed in this Congress, because, Mr. Chairman and Congressman Fish, it is imperative to get this on the books now so that in the next couple of years we can begin the hard work of negotiating the bilateral agreements, publishing in the Federal Register, getting the comments, getting these under our belt and getting going, because in the Antitrust Division today, there are 30 cases, major cases with international aspects.

In Jim Rill's tenure there were 16 such cases. He focused on this. We have continued to focus on it. We have 30 cases today, Mr. Chairman, many of which we cannot get the evidence we need to conclude and wrap up those cases. And there will be more, because that is the economy we are living in. That is the world we are living in.

We need this legislation so that we can get on with it. And I think the chairman recognizes that, and that is why we are all here today.

So what can I tell anyone?

[The prepared statement of Ms. Bingaman follows:]

Statement of Anne K. Bingaman
Assistant Attorney General
Antitrust Division

Before the Subcommittee on Economic and Commercial Law
House of Representatives Committee on the Judiciary

August 8, 1994

Mr. Chairman and members of the Committee:

I am pleased to be here today to testify on behalf of the Administration in support of H.R. 4781, the International Antitrust Enforcement Assistance Act of 1994. Enactment of this legislation is vitally needed if we are to bring our antitrust enforcement tools into line with the realities of the global economy of today and tomorrow.

I want to express the Administration's appreciation, Attorney General Reno's appreciation, and my personal appreciation, for the bipartisan effort that has led to the introduction of this bill. I want particularly to thank Chairman Brooks and Representative Fish for their commitment to developing an effective and balanced bill. As Chairman Brooks put it in June when we announced plans to seek this legislation, we are resolved to meet the global challenge to free market principles, and to have in place the resources and the tools to do the job right.

This bill is the product of an extensive and constructive dialogue in which I have met with members of the Committee and Committee staff, as well as counterparts on the Senate side, with representatives of the business community and of the bar. A special task force of the American Bar Association's Antitrust Section, formed to study the bill and led by former Assistant Attorney General Jim Rill, has made a tremendous contribution.

A broad consensus has come out of this dialogue. First, there is agreement that more effective enforcement tools are needed to protect American businesses and consumers from anticompetitive conduct in the international arena. Second, there is agreement that these tools must and can be developed in a way that safeguards confidential business information obtained from American firms from misuse or improper disclosure abroad. H.R. 4781 has been carefully crafted to achieve these objectives. It has been endorsed by companies like American Airlines, Apple Computer, Bethlehem Steel, Chrysler, Inland Steel, USX Corp., Viacom and Xerox.

We live in a global economy, in which the subject matter of antitrust enforcement can be as geographically widespread as the firms and the business activity that affect our nation's markets. Nearly a quarter of the United States' GDP is accounted for by export and import trade, roughly double the figure after World War II.

Today, international considerations in antitrust enforcement are in the mainstream of our enforcement activity. The Antitrust Division currently has some thirty active Sherman

Act matters with major international aspects -- nearly *double* the number that were ongoing just one year ago. And the number that were ongoing a year ago was itself high by historical standards, reflecting the renewed emphasis on international enforcement that Jim Rill, my predecessor under President Bush, had already begun.

Continuing this strengthening of the Division's international enforcement program has been a priority of mine since the day I came into office. One of the first steps I took was the creation, with the approval of Congress, of the position of international deputy assistant attorney general for antitrust, and the appointment of Professor Diane Wood to that position.

But the more active we are, the more apparent it is that the tools we have to deal with this international playing field are out of date. Enforcing the antitrust laws is a fact-intensive job. We need evidence to determine whether the law has been violated. If we conclude that there has been a violation, we need evidence to make a case that will stand up in court.

More and more often, the evidence we need is located abroad. Unfortunately, evidence that is located abroad is far too often evidence that is beyond our reach -- whether it is in the hands of private firms or individuals, or in the possession of a foreign antitrust enforcement agency. And when we cannot enforce our antitrust laws against foreign anticompetitive conduct because we cannot get the evidence, it is American consumers and American businesses that bear the cost.

The International Antitrust Enforcement Assistance Act would give us the tools we need to get foreign-located antitrust evidence that is beyond our reach today. The bill would enable the Justice Department and the Federal Trade Commission to enlist the help of foreign antitrust enforcers to get crucial antitrust evidence already in the foreign agencies' files, or in the possession of persons in their territory, by allowing us to offer reciprocal assistance in their antitrust investigations.

The Need for Foreign-Located Evidence

I noted a moment ago that the Antitrust Division currently has some thirty active Sherman Act investigations and cases with substantial international aspects. The most difficult challenge in these matters -- and too often the biggest frustration -- is getting information and documents from outside the United States. Many of these investigations involve straight-out cartel conduct aimed at American businesses and consumers. In several of these investigations, there is a serious possibility we will be unable to get the evidence to prosecute because crucial witnesses or documents are abroad and beyond our reach.

In some of these cases, only the U.S. is targeted and only U.S. antitrust laws are involved. Others of these cartels are aimed at both U.S. and foreign markets, and could be far more effectively investigated and prosecuted by joint action between U.S. and foreign antitrust authorities. In one such investigation recently, we seriously considered launching a coordinated investigation with a foreign antitrust authority; but we recognized that provisions

in both our laws would have prevented our sharing the evidence we obtained in our respective territories. We have good reason to believe the foreign antitrust authority involved could have obtained valuable evidence that was beyond our reach.

But let me give you a different example, in this case an example of what can be done with the kind of cooperation H.R. 4781 would make possible. Just three weeks ago, as a result of a joint investigation between the Antitrust Division and our counterparts in Canada's Bureau of Competition Policy, we broke up a $120 million dollar a year international cartel in the fax paper market. Criminal charges were filed in both the United States and Canada as a result of that successful cooperation. In the U.S., those charges were against a Japanese corporation, two American subsidiaries of Japanese companies, and the former president of one of the U.S. subsidiaries, for their involvement in a price fixing conspiracy that raised thermal fax paper prices by approximately ten percent. The defendants pled guilty, and agreed to pay U.S. criminal fines of more than $6 million dollars, and Canadian criminal fines of nearly 1 million Canadian dollars.

And just a few weeks earlier, in another investigation with critical Canadian assistance, including simultaneous raids for documents in the United States by the FBI and in Canada by the Royal Canadian Mounted Police, we successfully completed a major price fixing investigation in the $100 million a year plastic dinnerware industry. Criminal fines in the case so far have exceeded $8 million, and more are expected.

H.R. 4781 we will be able to expand this kind of cooperation, to come closer to the day when cartels can no longer prey on the American market from safe havens abroad.

All of the antitrust agreements we have entered into in the past with some of our foreign counterparts fall short, because they are limited by existing law. None of these agreements allows the enforcement agencies to share investigative information whose confidentiality is protected under national law. And none of them allows an antitrust agency to obtain information from private parties on a compulsory basis to assist an antitrust investigation in the other country. Even our 1991 agreement with the European Commission -- the most recent of our existing antitrust agreements -- would not have allowed us to discuss the evidence in our respective cases if Microsoft had not waived its objection to our doing so.

The vital importance of cooperation and access to foreign-located evidence has been recognized in other areas of economic law, where there are cooperative arrangements for access to foreign evidence that far surpass what can be done under present law in antitrust enforcement. Notably, in the securities area -- where the internationalization of the securities marketplace beginning in the 1980's highlighted the need for international cooperation in policing securities markets -- the SEC has fifteen memoranda of understanding with its foreign counterparts under which it can obtain confidential investigative information and seek assistance in obtaining overseas evidence, in exchange for the SEC's agreement to reciprocate. Similar arrangements exist for tax law enforcement.

These joint U.S.-Canadian investigations were possible only because we and the Canadians have a mutual legal assistance treaty for cooperation in criminal law enforcement that covers antitrust cases. Unlike Canada, however, most countries with which the United States has agreements of this kind do not treat antitrust matters as part of their criminal law, and thus it is far more difficult, and in some cases impossible, to use these agreements as a vehicle for cooperative efforts.

Let me give you another example. I know you are familiar with the parallel settlements last month of the U.S. and European Commission antitrust cases against Microsoft. It is absolutely clear that our cooperation with the European Commission in that case led to faster, more effective and consistent relief than would have been possible for either us or the European Commission working alone. As Business Week put it in an editorial the week before last, "In an era of global competition, the Justice Dept. used sound judgment by working closely with European governments. This also frees companies from having to defend the same case twice." The Financial Times called the joint settlements a "milestone in antitrust law" that resulted from "unprecedented cooperation between authorities in Washington and Brussels."

But cooperation in the Microsoft case was possible only because Microsoft agreed that the Justice Department and the European Commission could share information Microsoft had provided to the two agencies. Cooperation with Canada in the plastic dinnerware and fax paper cartel cases was possible only because the U.S.-Canada MLAT came into play. With

This is the kind of authority we need for antitrust -- authority that will expand our ability to protect businesses and consumers from anticompetitive conduct, wherever it takes place, that violates our antitrust laws. We need to be able to ask our foreign counterparts for information in their investigative files. We need to be able to ask our foreign counterparts to obtain information for us from companies and individuals in their territory. And in order to get that kind of cooperation, we need legislation that will allow us to reciprocate.

H.R. 4781 Will Provide the Needed Tools

First, H.R. 4781 would help us get evidence that foreign antitrust authorities have gathered in their own antitrust investigations that is relevant to a violation of our antitrust laws. The bill would allow the Justice Department and Federal Trade Commission to reciprocate by responding to requests from foreign antitrust authorities for investigative information that cannot be disclosed to them today because of confidentiality provisions in the Antitrust Civil Process Act, grand jury secrecy rules, and comparable provisions in the Federal Trade Commission Act.

Second, the bill would enable us get assistance from foreign antitrust authorities in gathering evidence from private firms or individuals that are beyond the reach of U.S. process, by giving us the ability to reciprocate. It would allow the Justice Department to use antitrust civil investigative demands to obtain information on behalf of foreign antitrust

authorities, or to seek a court order to compel the production of documents or testimony in the United States in aid of a foreign antitrust investigation.

All of these provisions are accompanied by extensive safeguards to make sure that confidential business information obtained from American firms will not be misused or improperly disclosed by foreign antitrust authorities. These safeguards are a crucial part of the bill. They are there to give confidence that these vital tools designed to protect our businesses and consumers from illegal anticompetitive conduct will not themselves open the door to unfair competition from abroad. Let me summarize these safeguards.

(1) First, *antitrust evidence could be provided to a foreign antitrust authority under the bill only pursuant to a publicly disclosed antitrust mutual assistance agreement.*

(2) *Before entering into any agreement, and before providing assistance under any agreement, the U.S. antitrust agencies would have to be satisfied that the foreign antitrust authority can and will meet stringent confidentiality requirements for the information that we provided.*

- The foreign antitrust authority must have laws in place that give protection to any information it receives from the U.S. authorities that is no less than the protection the information would have in the hands of the U.S. agencies.

- The Attorney General or Federal Trade Commission, as the case may be, must be satisfied that the foreign authority can and will comply with all applicable confidentiality requirements.

- The information must be used only for antitrust enforcement.

- The information must be returned to the Attorney General or Federal Trade Commission at the end of the foreign investigation or proceeding.

- If there is ever a breach of confidentiality, the person that provided the information would have to be notified, and the mutual assistance agreement would be terminated unless adequate steps were taken to minimize the harm from the breach and to make sure the breach does not recur.

(3) *The bill does not authorize the disclosure of premerger information that was received by the Attorney General or the Federal Trade Commission under §7A of the Clayton Act (Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976).*

(4) In addition, *the bill does not authorize the disclosure of information submitted to the U.S.Government in connection with title III of the Export Trading Company Act of 1982 or any other statute that is not a federal antitrust law within the meaning of the bill.*

(5) *The bill makes it clear that national security information cannot be passed along to a foreign agency.*

(6) *The bill includes provisions to assure that assistance under these agreements will be a two-way street, and that the foreign antitrust agency will provide us with assistance that is comparable in scope to what we agree to provide in return.* We have no intention to enter into one of these agreements -- and the bill would not allow us to -- unless we are satisfied that we are getting value in return. The whole point of this bill is to allow us to obtain the evidence we need to prosecute anticompetitive conduct that violates our laws, and we will not enter into agreements that do not further that objective.

(7) *Before providing assistance under the Act in response to any foreign request for assistance, the Attorney General or the Federal Trade Commission must conclude that doing so is consistent with the public interest of the United States.* This important safeguard gives further assurance that the Act will be implemented in a way that advances, and that it does not put at risk, important U.S. interests. The bill specifically directs the Attorney General and the Federal Trade Commission to include in their consideration any proprietary interest the foreign government involved may have that could benefit from or be affected by the assistance the U.S. agencies have been asked to provide.

Conclusion

Mr. Chairman, H.R. 4781 represents a carefully prepared mechanism that will allow us to get the evidence we need to enforce our antitrust laws in today's global economy, while safeguarding sensitive business information against misuse and improper disclosure. With this legislation, I believe that I and my successors, and our colleagues at the Federal Trade Commission, will have the tools we need to extend the level playing field for the benefit of American consumers and American businesses through expanded international antitrust cooperation.

I will be pleased to answer any questions that members of the Committee may have.

Mr. BROOKS. Well, you can tell us, since it will undoubtedly take time to reach agreements with other countries under the bill's provisions, when do you realistically see the agreements being reached, and with what countries?

Ms. BINGAMAN. Mr. Chairman, we will probably begin with Canada, because it is the major country today that we have one of these bilateral agreements with. But it only extends to criminal cases, not to civil. And it was under a mutual legal assistance treaty with Canada that we were able to do that.

But we have extensive experience with them, a lot of trust, and as you noted in your opening remarks, Mr. Chairman, we recently filed in the last couple of months two major cases due solely to the assistance of Canada in serving our subpoenas on documents in Canada to crack multinational foreign price-fixing cartels operating in this country against American businesses and consumers we wouldn't have gotten otherwise. So I think undoubtedly Canada will be an initial country we will talk to. And I hope they will be willing to take this next step with us. And we can publish it and go forward.

There are other countries, of course, which have extensive experience with confidentiality whose laws meet the tests set out in the bill for confidentiality who have extensive antitrust agencies that are serious about antitrust enforcement. We would turn to those also.

Realistically, Mr. Chairman, this will take some time because we have to negotiate these agreements. This is not a rapid thing. It requires trips abroad. And those agencies then have to get their legislatures' approval. But, Mr. Chairman, we have to start somewhere, and the time to start is now. The fact that the road will take us a while doesn't mean we can't start today and get going on it.

I would hope in a couple of years—by the time, realistically, given the average tenure of my predecessors, I might leave this office—I would very much hope to have some of these agreements——

Mr. BROOKS. In place.

Ms. BINGAMAN [continuing]. In place. That is my goal, Mr. Chairman. So I can leave this for the next administration to build on.

Mr. BROOKS. The bill would permit the Antitrust Division and the FTC to use your investigative powers to assist a foreign antitrust authority even if the conduct in question would not violate U.S. law. For the record, why should our Government be providing such assistance?

Ms. BINGAMAN. Mr. Chairman, it is critical that we do that for this reason. Our laws are the broadest in the world. We punish antitrust conduct that many countries don't punish. And under this bill, the agreements will be reciprocal, the statutes will be reciprocal. So you see the problem.

If we say we will only give assistance if something violates their law, they will say the same thing. They will only give assistance if something violates their law. And the problem is, that will come right back to hurt us, because it will narrow the scope of this, it will cut down on what we can get documents for, and it will hurt

us very, very badly. And so the reason for this provision is for the reciprocity that is needed.

Mr. Chairman, we enforce our antitrust laws more vigorously than any country in the world. We have the broadest laws in the world. We stand to gain from this immensely. And that is the reason for it.

Mr. BROOKS. Section 4(c) states that provisions of this measure cannot be used to compel a person to produce information in violation of any legally applicable privilege. Now, given the importance in our legal system of certain privileges, shouldn't this provision be explicitly clarified? If so, what clarifications would you suggest?

Ms. BINGAMAN. Mr. Chairman, that was deliberately written that way, taken from 28 U.S.C. 1782, so as to give businesses or individuals who want to object under the procedures already in existing law the broadest possible way to do it.

In other words, any court can rule on what is a legally applicable privilege. And it also would allow a court to rule on if a foreign privilege might be applicable. In other words, if we are to just sit here and list every possible thing we might think of today, we might miss something.

What this does is say to any person who wants to object, you name the objection, if you can find some law to support and you can find a judge who agrees with you, you got it.

And frankly, that is more protection than if we listed them. And so that is the reason it is left worded as it is.

Mr. BROOKS. That is the basic rule. If you start listing them, it is not——

Ms. BINGAMAN. You are going to miss some.

Mr. BROOKS. I understand. In the same regard, why is it appropriate for H.R. 4781 to forbid the sharing of Hart-Scott-Rodino filings while permitting the sharing of equally sensitive grand jury information?

Ms. BINGAMAN. Mr. Chairman, this is critically important. The grand jury information is critical to be shared for a couple of reasons.

Number one, most of what we are aiming at here is price-fixing cartels. That is basically what we are going after. And price-fixing cartels that are global, where the documents are located in foreign countries. We have got several of them right now that we know are happening, that the Europeans are investigating. We can't talk to them about what we have. They can't tell us what they have. And there are other such cases.

The problem is there are grand jury secrecy concerns because these cartels are investigated by grand juries, because it is criminal conduct. If we are not able to give that kind of information, we will not be able to exchange the most basic and important information that a foreign government, which also has a cartel, the same cartel under investigation, needs.

So number one, the grand jury information is crucial, and it is cartel activity and solely cartel activity that it reaches.

Number two, under mutual legal assistance treaties, we already share grand jury information in a number of other kinds of cases on a worldwide basis. We have over 20 mutual legal assistance treaties, not necessarily for antitrust, but the U.S. Government has

them for money laundering, drugs, terrorism, securities, fraud, international bank cases and so forth.

These are investigated by grand juries, and we often provide grand jury evidence, after obtaining an appropriate court order, and there is no reason we shouldn't be able to do the same thing for antitrust investigated by a grand jury.

So for reciprocity we need it. For the criminal cases we need it. The Hart-Scott-Rodino, Mr. Chairman, is in a different boat for this reason.

Companies that come to us wanting to merge on a global basis, they want something from us. People running from us with grand juries want to hide something from us. So you have a completely different dynamic. That is the fact of the matter. People wanting to merge want to give you their documents. They will shove a thousand documents at you, "Here, take them, we want to put our merger through."

So the fact is for law enforcement, we don't need the Hart-Scott material nearly as badly because we have other ways to get it and we also have a provision in the statute that allows us to ask a foreign government to serve a subpoena in a merger case if we turn out to need it and vice versa.

The business community and groups representing business were extremely concerned about Hart-Scott when we met with them. It was their number one concern. And that was because typically it concerns sensitive, strategic plans, what are you going to do 10 years down the road. And they were very, very worried that a foreign enforcement agency might let those slip into the hands of a competitor.

So, Your Honor—Your Honor, I am used to talking to a judge, Mr. Chairman, forgive me, I am sorry. You don't want to be Your Honor. You would rather be Mr. Chairman. You have got more going right here than any judge. I shouldn't say that. I am not in a court so I can put that on the record. In any event——

Mr. BROOKS. We have created a lot of judges. Sometimes you wonder.

Ms. BINGAMAN. In any event, the bottom line is, for law enforcement purposes, the grand jury information is critical, crucial, and the guts of this bill, and the Hart-Scott material, given the sensitivity to the business community, we concluded, given the dynamics I discussed and the rare case we need it, we can find another way to get it. That is the reason in a nutshell, that there is a different treatment.

Mr. BROOKS. Thank you very much.

Mr. Fish.

Mr. FISH. Thank you, Your Honor.

Ms. BINGAMAN. I will bet he has had people do that to him before. I might do it to you here in a minute. Maybe I have learned my lesson. I will try.

Mr. FISH. This legislation does not contain language explicitly authorizing the Department of Justice or the Federal Trade Commission to enter into these agreements, and I wondered why it didn't.

In your view, does the Justice Department already have the authority to enter into antitrust mutual assistance agreements? And if so, why is this legislation necessary?

Ms. BINGAMAN. Congressman Fish, we do have the authority to enter into them, but the problem is there are other statutes on the books, such as grand jury secrecy under rule 6(e) and the CID statute which imposes secrecy, which would not allow us to exchange confidential documents.

So what this legislation does is affect the confidentiality requirements of those statutes under the procedures set out in the bill.

Mr. FISH. OK. I will get to some of those specifically. But first, you know, you have said things in your testimony such as, "U.S. antitrust enforcement is the most active in the world" and "U.S. antitrust laws are the broadest in the world." Because of this you conclude that we stand to gain more than the other countries.

Now, the act contemplates reciprocal enforcement of foreign and U.S. antitrust laws. If ours are, as you say, broader than any in the world, then why would a foreign country agree to facilitate enforcement of our broader laws in their country while they can only enforce their narrower laws in ours?

What I am getting to is, do you anticipate that some of these mutual assistance agreements might reflect efforts in the other countries to harmonize the respective reach of their antitrust laws and may result in changes to our own antitrust laws?

Ms. BINGAMAN. No, Congressman Fish, this is purely procedural. It does not go to the substantive law of either country. That is, it simply sets up parallel procedural mechanisms for obtaining evidence through exchange of information to allow us each to enforce such laws as we have in our respective jurisdiction.

But it is a fact that we have broad laws, and we actively enforce them, and therefore, to my mind, there really is no question that we stand to gain immensely from this legislation. I think that is the fact. Law enforcement in the United States does.

Mr. FISH. OK. Well, I hope you are right, because even if it is procedural, we are still talking about enforcement. I didn't know whether or not you anticipated any substantive efforts by another country.

These are fairly long questions here, but I hope you have had a chance to review them.

Ms. BINGAMAN. Yes, I appreciated receiving them and I did look through them.

Mr. FISH. They reflect questions raised by two witnesses on the next panel, and I think it would be helpful now to get your view in the record.

The U.S. Council of International Business, whose witness will be testifying on the next panel this afternoon, is very concerned about the prospect of disclosure of sensitive pricing data, new product and cost information, strategic plans, trade secrets, and other confidential material to a foreign antitrust enforcement agency. And the National Association of Manufacturers and the Chamber of Commerce share this concern. The Council suggests that there be notice to the company concerned, a short time period in which they can object, and an expedited judicial review procedure that could override the Attorney General or the FTC in case of an abuse

of discretion. Is that something that you would consider reasonable?

Ms. BINGAMAN. Congressman Fish, that will absolutely vitiate, and a word we used in New Mexico, gut this bill. We would profoundly object to it. It is absolutely unworkable.

Let me explain why that is. The heart of what we are after here is cartel behavior. That is the reality. There are global cartels operating, truthfully, more than I would have ever imagined before I sat in this chair and saw the evidence before me as to what we know is going on.

And the fact is there are usually one or two U.S. companies, and three, four, usually no more than that, foreign companies. These are major, major worldwide industries with multinational players and sometimes no American companies, but usually one or two, with world market allocations and fixed prices.

This is criminal behavior. This is criminal price-fixing behavior. It is investigated in the United States through grand juries. We do not give grand jury targets notice of what we are going after, what witnesses we are calling, what the theory of our case is, what the investigation is about, and so forth.

And if what seems like an innocuous notice provision were to be put in, what that would mean is we would blow the cover of our most sensitive, highest profile and most important criminal global price-fixing investigations. And we don't do that for any other type of cooperation with foreign enforcement authorities, which we have a lot of.

As I mentioned in an earlier answer, we have 20 mutual legal assistance treaties with foreign governments which allow us to exchange grand jury information after review by a judge. We would go to a court for approval here, but we exchange it for terrorism, for money laundering, for drug cases, for securities cases, for international banking fraud cases, all kinds of international financial transactions which are criminal in scope are exchanged with foreign countries, just like antitrust criminal information would be without notice as such to the target.

And that is because it would destroy and cripple and gut the law enforcement effort if you had to tell the target of a grand jury, "Country X is also investigating you." So you see the problem. That is number one.

Number two, there is judicial review right now, because you go to a judge to get authority to turn over grand jury materials, and you have to justify that to a judge. A Federal judge looks at this and puts this—we are already under court order as to confidentiality. The bill already has confidentiality provisions.

So there is judicial review. There is judicial review for CID subpoenas served at the behest of a foreign government, if we choose to do that, in our discretion if our bill is passed and these are enacted. The company served with such a CID can go to the court and object, and say we don't want the Division to have this for whatever reasons.

So, Congressman Fish, there is ample opportunity for judicial review built in under existing law. To add this final step, which sounds OK on the surface, in fact would cut at the very heart of this bill.

Finally, because this proposed review is under an abuse of discretion standard, my good friend Jim Rill made a point last week which is clearly right. Abuse of discretion is a tough standard to meet in court. And this would have been through the procedure of notice in the Federal Register, negotiation of these MOU's, a determination by the Attorney General that this particular situation should be exchanged.

In other words, realistically, how many judges are going to set all that aside and not allow the Attorney General's decision to go forward?

So what you are building in is a provision that would have virtually no practical impact but would cut at the heart of the bill.

I am sorry to go on so long, but this is the guts of the issue that has been raised, and it is a terribly crippling, damaging provision that is really unworkable.

Mr. FISH. Mr. Chairman, I am glad we didn't get a wishy-washy answer.

Your answer primarily concentrated on criminal violations, and then you got into civil enforcement. Is it fair to say that with respect to civil liability, that you think the standard is different and there should be an opportunity——

Ms. BINGAMAN. No, what I said is there is an opportunity for civil already.

Mr. FISH. There already is judicial review?

Ms. BINGAMAN. Yes, under the CID statute people can go to court right now to object to any CID issue. There is a whole process for that. They can make any arguments they choose to.

Mr. FISH. Do I have time for one more question, Madam Chairman?

Mrs. SCHROEDER [presiding]. Yes.

Mr. FISH. Thanks.

My question goes a little beyond the question the chairman asked. The legislation would give foreign governments access to testimony given under a grant of immunity before a grand jury, and as it stands, they would be under no obligation to respect that grant of immunity. The ABA antitrust task force recommends this bill be amended to ensure that immunized U.S. witnesses receive equivalent immunity from any foreign antitrust agency to whom their testimony is disclosed. Would you support such an amendment?

Ms. BINGAMAN. No, Mr. Congressman, we would not, for the following reasons. Number one, the weight of authority of existing law is that the privilege against self-incrimination extends only to the risk of prosecution under U.S. law. In other words, when a witness is immunized, right now it is only from prosecution by U.S. authorities, not foreign. And therefore this proposed provision would go further than current law goes. That is number one.

Number two, there are only a handful of countries that have criminal antitrust statutes today. That is one of the ways in which our law is so much broader than other countries' law. And that is Canada, Japan, and Brazil. Canada actively enforces criminal statutes, and that is where we have had these two international cartels

that we have broken recently with the help of the Canadian authorities. Brazil has not had an active criminal enforcement program. Japan has only had two criminal cases in history, and they are quite recent. They are very new at this.

So the fact of the matter is, the likelihood of criminal prosecution by any government other than Canada is slight at best, really negligible, and Canada we can already exchange the criminal information with under the mutual legal assistance treaty. So when you strip away and get down to what this is really about, number one, it goes further than existing law, and number two, on the facts, it is just not needed as a practical matter.

Mr. FISH. Thank you very much. Thanks a lot.

Are we going to have a second round, do you think? Let me put it this way. I ask unanimous consent that the questions we don't get to ask the Assistant Attorney General we can submit in writing.

Mrs. SCHROEDER. Without objection, I don't think there is any problem with that.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you.

I am not an expert on antitrust and certainly not an expert in foreign antitrust laws. You indicate we have a problem with enforcement. Do the foreign countries we are talking about dealing with have laws against price fixing and other kinds of antitrust activities?

Ms. BINGAMAN. Many do, perhaps most do, but some have much narrower laws against price fixing than we do. Many have completely different remedies, their courts construe them differently.

And that is the problem. If you have this completely reciprocal provision, if that is what you are aiming at, you get into extremely complicated questions with each country, and they can change as their court interpretations change.

Mr. SCOTT. I guess what we are aiming at is antitrust behavior in the United States for which we need evidence that may be located somewhere else; is that what the bill is about?

Ms. BINGAMAN. It is about two things. That is part of it. It is often conduct abroad or in the United States that affects consumers in the United States or affects exports from the United States. But the evidence is abroad. The conduct can either be in the United States or elsewhere. It just depends.

Mr. SCOTT. But I mean the harm done that we are trying to relieve is done against U.S. citizens?

Ms. BINGAMAN. Absolutely. It is done against U.S. citizens or businesses in their export trade.

Mr. SCOTT. I guess my question is, what interest does a foreign country have if the only harm from their perspective is a few businesses and a few U.S. citizens get ripped off by price fixing? Are they interested in helping us solve that problem?

Ms. BINGAMAN. Yes, because most frequently, many, many, many of these cases, I would say the majority or vast majority, involve cartel conduct, price fixing, which hurts consumers both in the United States and in some foreign country.

For instance, these two cases we did with Canadians, those were cases that involved consumer price fixing in both countries, one big market. That is the kind of thing we are going at.

That is why foreign authorities will be interested in finding out when we have learned about a case, often because we have larger staffs, more antitrust enforcement authority. We will know more in practice because of what we can gather in this country, which may be more than they are able to put together, even though they have documents over there that we need to complete our case. We may have a good start on it, but we may not have been able to get finished because of staffing or many other possible situations.

But there are a lot of reasons they would be interested in helping us, and it is in their self-interest as well.

Mr. SCOTT. One of the questions that was asked involved secret information. Obviously, when you do these investigations, you run across secret information. What happens to that and what happens if someone is harmed if their secret gets out?

Ms. BINGAMAN. By secret information, do you mean confidential business information?

Mr. SCOTT. Trade secrets, confidential business information, secret formulas in how a product is made.

Ms. BINGAMAN. Number one, the notice provisions in the bill, before any MOU is finalized, it is published in the Federal Register. We receive comments. And if any person anywhere has reason to believe that the foreign authority that we are proposing to enter into an agreement with will not keep confidential and does not have adequate laws and procedures to do so, it certainly is incumbent on us to investigate that, and we will. But number two, the public knows exactly what we are doing. It is completely transparent. And believe me, any administration would take comments about unreliability or lack of protections or whatever with utmost seriousness.

So number one, you know what you are getting into. You know the reputation and history of what you are dealing with. If, after all of that, some exchange is made and something does get out, the foreign government is required to notify us immediately, and we are required under this bill to terminate the agreement. We first give notice to the company that is involved immediately, and second, to terminate the agreement with that foreign enforcement agency that did not honor its pledge and duty to keep confidential this information unless we are assured absolutely that in the future such confidences will be kept.

So there are a lot of procedural safeguards——

Mr. SCOTT. Is there any for the business that may be harmed? Is there any compensation or any assistance given to them?

Ms. BINGAMAN. Can they get damages, you mean?

Mr. SCOTT. Right.

Ms. BINGAMAN. No, but they can't get damages right now. Listen, they give information to me under the same kind of laws about confidentiality. What if somebody in my office fouls up and does something? Can they sue me? No. That is law enforcement, you know?

We have to have some procedure here to obtain information, or we are just stymied by hypothetical concerns about what happens

down the road—if, if, if. Well, heck, let's just all go home and forget it. We have got laws on the books we can't enforce. That is what it comes down to.

Mr. SCOTT. Thank you, Madam Chairman.

Mrs. SCHROEDER. Thank you very much.

The gentleman from New York is happy to submit the rest of his questions.

Let me thank you very much for the chairman and for the panel. We truly appreciate your being here and your knowledge on this subject. And if you think of more things, let us know, and if we think of more questions we will submit them in writing. Thank you very, very much.

[See appendix 1.]

Mrs. SCHROEDER. The next panel we have this afternoon is a three-part panel. We first have the very able James Rill, who is a partner with the law firm of Collier, Shannon, Rill & Scott here in Washington. Mr. Rill also served as Assistant Attorney General for the Antitrust Division during the Bush administration, and it is good to have him here before the committee again.

Next we have Mr. Michael Blechman, the Chairman for the Competition Committee, U.S. Council for International Business. He is a partner with the law firm of Kaye & Scholer.

Our final witness is Lewis Goldfarb, assistant general counsel, Chrysler Corporation, Highland Park, MI.

In the interests of time, we will ask each of you to summarize your statement in 5 minutes. We will put your entire written statement in the record and after all of you have completed your testimony, we will open it up for questions.

Mr. Rill.

STATEMENT OF JAMES F. RILL, COLLIER, SHANNON, RILL & SCOTT, AND FORMER ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, PRESENTING THE VIEWS OF THE SECTION ON ANTITRUST LAW AND THE SECTION ON INTERNATIONAL LAW AND PRACTICE OF THE AMERICAN BAR ASSOCIATION

Mr. RILL. Thank you very much, Mr. Chairman.

The written statement that I have consists of a report supported by the Antitrust Section and the International Law and Practice Section of the American Bar Association. I request that that report be placed in the record.

Mrs. SCHROEDER. Without objection, so ordered.

Mr. RILL. Let me summarize our points and let me also say it is a pleasure to be back here before the committee and to renew acquaintances. The committee gave great support to our efforts in the Bush administration, and hopefully will continue to support antitrust enforcement in the current administration.

The ABA Sections of Antitrust Law and International Law and Practice endorse the legislation in large part because it will greatly improve the ability of U.S. enforcement agencies to attack antitrust violations arising from conduct occurring overseas that adversely affects U.S. consumers and U.S. foreign commerce.

In addition, the bill represents an important step towards greater opportunities for U.S. and foreign enforcement authorities to improve enforcement convergence, to reduce regulatory transaction costs, and to improve the quality, I would submit, of overall antitrust analysis.

There has been—this is almost commonplace—a widely perceived, generally recognized dramatic increase in business transactions which have international ramifications. While this growth certainly applies to mergers, it applies as well to joint ventures, intellectual property right transfers, vertical distribution arrangements, and to hardcore cartel activities, regrettably including overseas private restraints that have an adverse effect on U.S. trade.

Concern with this conduct, of course, led the Department of Justice in 1992 to repeal the now-famous footnote 159 in the 1988 Antitrust International Guidelines and make clear that from that time forward the Department would be enforcing the antitrust laws against conduct occurring overseas which has a substantial, foreseeable, adverse effect on the foreign commerce of the United States.

If I may draw on my own experience as Assistant Attorney General from 1989 to 1992, I can say that the Department of Justice enforcement was constrained to a significant degree by our inability to obtain discovery of information relating to trade restraints that occurred overseas.

As you can appreciate, I can't deal with specific cases that were under investigation, but in some circumstances where we had reason to believe that a violation might be occurring that was restricting U.S. exports, either by horizontal boycott or exclusive vertical arrangements tying up an entire sector of the economy, we were not able to take effective action because the evidence was extremely difficult, if not impossible, and at the least very time consuming to obtain. In short, the process is tedious and the outcome uncertain.

H.R. 4781, sponsored by the chairman and ranking minority member of this committee, will give DOJ and FTC the tools to obtain cooperation from their overseas counterparts through information sharing. To say in effect we are prepared to help you, but you must help us obtain the critical information we need to enhance vigorous enforcement of our antitrust laws against conduct occurring overseas.

It is for that reason I think that you can see the legislation does have widespread business support as well as the support of the bar. Companies such as American Airlines, Apple Computer, Bethlehem Steel, Chrysler, Inland Steel, USX, Viacom, Xerox, all support the Brooks-Fish legislation.

The concerns expressed by many relative to confidentiality of information given to foreign authorities are important and should be taken very seriously. And I can say that the Antitrust Division has worked with the American Bar Association task force from early March forward to address these concerns.

The provisions in the bill go very far to assure confidential information, to assure the confidentiality of information that is sensitive. These provisions include conditioning the agreements and

information transfers on assurances and satisfaction that the foreign authority will provide confidentiality safeguards at least equal to those that apply in the United States; provide that the terms of each agreement be subject to notice and public comment; and require the repudiation of agreements where confidentiality safeguards are breached.

These and other provisions, I think, should provide adequate assurance that sensitive documents will not be improperly released by U.S. or foreign agencies. I am certain that the Antitrust Division and the FTC will carefully and prudently exercise their judgments consistent with the language and spirit of the legislation.

And for all of the foregoing reasons and for those set forth in the task force report, the ABA Section of Antitrust Law and Section of International Law and Practice endorse H.R. 4781 and hope that it is enacted.

Thank you, Madam Chairwoman.

[The prepared statement of Mr. Rill follows:]

August 1, 1994

REPORT OF THE SECTION OF ANTITRUST LAW AND THE SECTION OF INTERNATIONAL LAW AND PRACTICE OF THE AMERICAN BAR ASSOCIATION ON THE PROPOSED INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT

These views are presented on behalf of the Sections of Antitrust Law and International Law and Practice. They have not been approved by the Board of Governors or House of Delegates of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

Introduction

The Department of Justice has proposed legislation, the International Antitrust Enforcement Assistance Act of 1994 (the "IAEAA"),[1] that would make possible broad-ranging cooperation in antitrust enforcement between the United States and other nations. The bill, which was introduced by Senators Howard Metzenbaum and Strom Thurmond in the Senate,[2] and Congressmen Jack Brooks and Hamilton Fish in the House, on July 19, 1994, would authorize the Attorney General and Federal Trade Commission ("FTC") to enter into bilateral agreements with competition agencies in foreign jurisdictions for assistance in antitrust investigations and the sharing of information to assist in antitrust enforcement. Specifically, the IAEAA would allow, but not require, investigatory cooperation and information sharing by the United States in aid of foreign antitrust agencies, conditioned on advance reciprocal undertakings of cooperation and subject to certain confidentiality safeguards.

The Department of Justice ("DOJ") and FTC have been frustrated by their inability to investigate fully and effectively anticompetitive conduct occurring overseas. Too often, foreign governments are unwilling to cooperate in U.S. antitrust investigations. The IAEAA is designed to induce foreign governments to cooperate in U.S. antitrust investigations. It addresses a concern expressed by enforcement authorities that there are serious impediments to effective enforcement of competition laws against conduct that may occur beyond the borders of the

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1 S. 2297 and H.R. 4781.

2 Additional bipartisan Senate sponsors include Senators Kennedy, Biden, Leahy, Simon, Simpson, and Grassley.

country in which the relevant enforcement agency operates or that involve documents or other information located overseas and in the possession of a sister agency. In such cases, DOJ and FTC have stated that effective antitrust enforcement has been severely impaired by the inability of the antitrust bodies of various nations to cooperate with one another in the conduct of investigations.

Restrictions on disclosure of information by the FTC or DOJ impair their ability to assist foreign agencies and, therefore, the ability of U.S. agencies to seek reciprocal cooperation from foreign competition authorities. For example, as discussed below, current law in the United States narrowly limits the extent to which compulsory investigatory process can be used by the DOJ and the FTC in aid of another nation's antitrust investigation. By the same token, statutory limitations on disclosure of grand jury materials, information submitted under the Hart-Scott-Rodino Act, and materials obtained pursuant to civil investigative demands or FTC compulsory process greatly restricts information sharing with foreign agencies. With respect to cooperation, the Antitrust Section's Special Committee on International Antitrust concluded:

> In order for such [cooperative] consultation to be informed and effective, the agencies must be able to discuss fully the facts of the transaction in question. This requires an amendment in the confidentiality laws of the different jurisdictions to permit interagency disclosure. We recommend such amendment, subject to adequate safeguards that all information thus disclosed remain confidential to the agencies receiving it. [American Bar Association Section of Antitrust Law, *Report of the Special Committee on International Antitrust*, page 169, September 1, 1991.]

Similarly, the Antitrust Section's NAFTA Task Force highlighted the importance of information sharing among competition authorities:

> The most significant obstacle to effective cooperation and coordination among competition authorities is the restriction on information sharing imposed by statutory confidentiality requirements. . . . Provided that the parties implement adequate measures to safeguard the confidentiality of information communicated by one competition authority to another, extensive information sharing between competition authorities would greatly enhance the efficiency and effectiveness of competition law enforcement within the free trade area. [American Bar Association Section of Antitrust Law, *NAFTA Task Force Report*, 228-229 (July 18, 1994.)]

The IAEAA is designed to facilitate the provision of such assistance by the DOJ and the FTC. The agencies anticipate that in return for this cooperation by the United States, foreign agencies will provide assistance to the DOJ and FTC, thereby enhancing U.S. antitrust enforcement.

There are now substantial impediments to the ability of the U.S. antitrust agencies to reach anticompetitive conduct occurring overseas that has a direct, substantial, and reasonably foreseeable effect on the foreign commerce of the United States.[3] According to Assistant Attorney General Anne K. Bingaman:

> Unfortunately, the traditional mechanisms available to U.S. enforcement officials for obtaining foreign-located antitrust evidence are not sufficient to meet the needs of modern antitrust enforcement. For example, an attempt to obtain information through a letter rogatory procedure could conceivably involve disclosure of sensitive facts to several layers of bureaucracy within the requested country, months of deliberation, and no results. [*See* Address by Anne K. Bingaman before the World Trade Center Chicago Seminar, p. 11 (May 16, 1994)].

It is essential that the U.S. government be able to offer reciprocal cooperation in order to strengthen its own enforcement abilities with respect to overseas conduct.

There have been many instances in which U.S. antitrust investigations have faltered or even failed as a consequence of the inability of the DOJ or FTC to obtain evidence from abroad. The Justice Department's paper providing background information on the IAEAA states that two recent cartel investigations were abandoned because the Antitrust Division was unable to secure evidence located in foreign countries from the suspected cartel participants, despite excellent relationships with the foreign government involved.[4] However, there have also been cases that have been facilitated by cooperation from foreign governments, and these cases provide the incentive to secure such cooperation from other foreign governments. The IAEAA seeks to maximize the opportunities for effective cooperation among antitrust authorities, and thereby enhance antitrust enforcement in the U.S. and in foreign countries.

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[3] Under the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a, U.S. courts have antitrust jurisdiction over such conduct.

[4] The International Antitrust Enforcement Assistance Act of 1994, Department of Justice Explanation.

The Task Force supports the objectives and direction of the proposed legislation. As introduced, the IAEAA addresses many of the concerns of the Task Force. Most significantly, the Task Force supports the provisions in the bill as introduced that strengthen substantially the assurance that a foreign agency receiving otherwise confidential information from the United States will safeguard the confidentiality of that information. At a minimum, foreign agencies should provide protections at least equivalent to those in force under U.S. law and the rules and practices of the DOJ and FTC. Congress should legislate broad parameters of confidentiality, but rather than enumerating specific safeguards in legislation, Congress should provide that the Department of Justice, in consultation with the FTC, would by rulemaking prescribe standards for reasonable assurances of confidential treatment that would be a necessary predicate to any investigatory cooperation or information sharing. Those standards also would be contained in bilateral agreements between U.S. agencies and foreign agencies. In addition, the Task Force recommends several other amendments.

I. ELEMENTS OF PROPOSAL.

The proposed legislation has two principal thrusts: (1) to authorize reciprocal cooperation in antitrust investigations; and (2) to provide for reciprocal sharing of documentary and other information in the possession of the U.S. antitrust enforcement agencies which is not otherwise disclosable. Cooperation and information sharing are not made mandatory by the legislation, but would be dependent upon negotiation of bilateral agreements[5] with a foreign antitrust regulator and a determination by the Attorney General with respect to investigatory cooperation, and by the Attorney General or Federal Trade Commission with respect to information sharing, that: (1) the foreign agency in question would provide cooperation and information on a reciprocal basis; (2) the foreign agency would provide reasonable assurances of protection of confidential information provided to it; and (3) the cooperation or disclosure is in the public interest.

A. U.S. Cooperation in Foreign Investigations.

One of the major provisions of the IAEAA deals with the conduct of investigations in aid of foreign antitrust authorities, and involves only conduct by

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[5] The Task Force recommends that the IAEAA specifically authorize and require such bilateral agreements as a condition for cooperation. *See* p. __ *infra*. As introduced, the bill requires such agreements.

the Attorney General, not the Federal Trade Commission. The apparent reason for this limitation is that the refusal to provide investigatory cooperation on the ground of inconsistency with the public interest could involve foreign policy considerations, which are uniquely within the province of the Executive Branch.

The IAEAA authorizes cooperation with foreign authorities, including such supranational authorities as the European Union, with respect to an investigation into whether any person is violating or is about to violate any of their laws or rules relating to "antitrust matters," which is defined to mean any law or regulation prohibiting conduct similar to that prohibited by the antitrust laws as defined in 15 U.S.C. § 12 or as an unfair method of competition (not a deceptive act or practice) under Section 5 of the FTC Act, 15 U.S.C. § 45. Cooperation may occur regardless of whether:

- The possible violation being investigated is subject to criminal or civil sanctions;
- The conduct is also a violation of U.S. laws; or
- The U.S. is conducting or is likely to conduct an investigation regarding a violation of U.S. law.

A major mechanism for cooperation under the proposed legislation is the civil investigative demand ("CID") authority under the Antitrust Civil Process Act, 15 U.S.C. § 1312. That statute would be amended, in part, by authorizing the Attorney General to issue civil investigative demands to investigate the alleged violation of any law or rule relating to antitrust matters administered or enforced by a foreign antitrust authority. Although the provision of information obtained by CID to the relevant foreign authority is not expressly permitted under the IAEAA, it may be implied as obvious in the context of the legislation or covered by the information-sharing provision.[6] The legislation also would provide, as an alternative, a form of 28 U.S.C. § 1782, which currently permits U.S. courts to enter orders for taking testimony for proceedings pending in foreign tribunals.[7] It would make clear that that provision applies to assistance to foreign agencies as well as "tribunals" by means of court-ordered investigatory process.

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[6] The Task Force recommends that the bill be amended to authorize explicit disclosure to foreign antitrust authorities of information obtained through CIDs. *See* pp. 8-9 *infra*.

[7] *See* p. 14 *infra*.

B. Disclosure of Information.

The second major aspect of the proposed IAEAA deals with the possible reciprocal disclosure of otherwise confidential information to foreign antitrust authorities and covers information in the possession of either the Department of Justice or the Federal Trade Commission. The measure would override every provision of law restricting disclosure of information by the FTC or DOJ, except the HSR Act.

Disclosure of evidence would be authorized to assist a foreign antitrust authority in investigating matters that violate the laws or rules administered by that authority. A court order would be required to authorize the disclosure of matters occurring before a grand jury.

As with assistance in investigations, as now drafted, disclosure of information under the IAEAA would be conditioned on the Attorney General or the FTC authorizing disclosure after taking into account reciprocity, the public interest, and adequate assurances regarding the protection of confidential information.

C. Protection of Information Obtained from Foreign Agencies.

The legislation would create a new exemption from the Freedom of Information Act, 5 U.S.C. § 552, providing that information received from foreign authorities is not subject to the mandatory disclosure requirements of the statute. In addition, the IAEAA would provide that materials received from a foreign authority may not be disclosed in a manner inconsistent with assurances given by the Attorney General or FTC.

II. LIMITS UNDER CURRENT LAW ON DISCLOSURE OF INFORMATION OBTAINED BY U.S. ANTITRUST ENFORCEMENT AGENCIES.

Several statutory provisions safeguard the confidentiality of information obtained by the federal antitrust enforcement agencies in the U.S., including the Hart-Scott-Rodino Act (15 U.S.C. § 18a(h)), the Antitrust Civil Process Act (15 U.S.C. § 1313(c)(3)), the Federal Trade Commission Act (15 U.S.C. §§ 41, *et seq.*), the Trade Secrets Act (18 U.S.C. § 1905), and Federal Rule of Criminal Procedure 6(e). Under current law, these provisions preclude DOJ and the FTC from providing information to other non-federal antitrust enforcers, such as foreign antitrust authorities or state attorneys general.

A. Confidentiality of Information Obtained Pursuant to Premerger Notification Under the Hart-Scott-Rodino Act.

When the Hart-Scott-Rodino Act was enacted in 1976, strong statutory protections of confidentiality were included to induce cooperation by the merging firms. The HSR Act has been a success and firms are willing to disclose highly sensitive business information to DOJ and the FTC because the business community has confidence that information disclosed will be kept confidential. Section 7A(h) of the Clayton Act imposes confidentiality restrictions on both the Federal Trade Commission and the Department of Justice in connection with information received by those agencies from parties to a merger or acquisition in connection with statutory premerger notification requirements.[8] That provision limits the disclosure of such material in the following terms:

> Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempted from disclosure under § 552 of Title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress. [15 U.S.C. § 18a(h)].

The parties submitting premerger notification information may waive confidentiality protections so information may be disclosed on a limited basis. A protocol for the provision of such information pursuant to waiver has been adopted

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[8] This provision has generated considerable controversy between the federal enforcement agencies and state attorneys general. In *Mattox v. Federal Trade Commission*, 752 F.2d 116 (5th Cir. 1985), and *Lieberman v. Federal Trade Commission*, 771 F.2d 32 (2nd Cir. 1985), the courts concluded that Section 7A(h) prevents the antitrust enforcement agencies from making HSR materials available to the state attorneys general or to any other person or entity except as prescribed by statute. As a result of these decisions, confidentiality is preserved and the materials protected from disclosure, without the consent of the submitting parties, other than to Congress or committees or subcommittees of Congress.

The committees of the U.S. Senate and House of Representatives typically have procedural rules whereby the disclosure of information is governed. *See, e.g.*, Senate Manual, Sen. Comm. on Rules and Admin., 102d Cong., 1st Sess. 53 (1992). As a consequence, the ordinary circumstance is that the committee or subcommittee must vote by a majority to obtain the information; agencies need not honor the request of an individual member of the Senate or House.

by the Department of Justice and by the Federal Trade Commission and provides that the material submitted by merging parties could voluntarily be turned over to State antitrust enforcement agencies pursuant to a letter provided by the merging parties waiving confidentiality provisions to the extent necessary to permit coordinated enforcement between the Department and the relevant State agency.[9]

As introduced, the IAEAA expressly excludes HSR materials from the documents and information that may be disclosed to foreign agencies. In the future, if international coordination of merger investigations is to be achieved, some means of sharing confidential HSR information with foreign antitrust agencies must be developed.

B. Materials Obtained Through Civil Investigative Demands.

The confidentiality of information obtained by the U.S. Department of Justice by CIDs is protected by the Antitrust Civil Process Act:

> Except as otherwise provided in this section, while in the position of the custodian, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination without the consent of the person who produced such material, answers, or transcripts, and, in the case of any product of discovery produced pursuant to an expressed demand for such material, of the person for whom the discovery was obtained, by any individual other than a duly authorized official, employee, or agent of the Department of Justice. Nothing in this section is intended to prevent any disclosure to either body of the Congress or to any authorized committee or subcommittee thereof. [15 U.S.C. § 1313(c)(3)].

There is little authority construing Section 1313(c)(3). It appears to be co-extensive both in its coverage and in its exceptions with the comparable provisions of the HSR Act. One court has interpreted Section 1313(c) as affording adequate protection against disclosure to third parties such that a party issued a

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[9] U.S. Department of Justice, *Justice Department Announces New Procedure to Coordinate Merger Antitrust Investigation with States* (Mar. 6, 1992) (press release); FTC Notice, 57 Fed. Reg. 21795 (1992). However, even the protocol permits only disclosure of the HSR filings and not additional information gathered by DOJ or the FTC during the investigation.

CID could not avoid compliance on the basis that the documentation it was being forced to produce contained confidential proprietary information.[10]

C. Materials Obtained by the FTC.

The general investigatory powers of the Federal Trade Commission are set forth in Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), which prohibits disclosure to the "public" of trade secrets, confidential commercial or financial information, privileged commercial or financial information, line-of-business data, and subpoenaed documents.[11] FTC regulations undertake to define "trade secrets and commercial and financial information" and apply to:

> Competitively sensitive information, such as costs or various types of sales statistics and inventories. It includes trade secrets in the nature of formulas, patterns, devices, and processes of manufacture as well as names of customers in which there is a proprietary or highly competitive interest. [16 C.F.R. § 4.10(a)(2)].

Moreover, Section 14 of the FTC Act, which applies to "any document or transcript of oral testimony received by the Commission pursuant to the compulsory process in an investigation . . . [regarding] any provision of the laws administered by the Commission," affords confidentiality as follows:

> Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, reports or answers to questions, and transcripts of oral testimony shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material or transcripts. Nothing in this section is intended to prevent disclosure to either House of the Congress or to any committee or subcommittee of the Congress, except that the Commission immediately shall notify the owner or provider of any such information of a request for information designated as confidential by the owner or provider. [15 U.S.C. § 57b-2(c)].

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10 *In re Emprise Corporation*, 344 F. Supp. 319 (W.D.N.Y. 1972).

11 *See generally* ABA Antitrust Section Working Paper, *The Treatment of Confidential Information by the Federal Trade Commission* (1990).

Not included within the prohibition against disclosure in Section 14, however, are Congress and federal and state law enforcement authorities, providing the latter furnish satisfactory assurances of confidentiality.

D. Prohibition Against Disclosure of Trade Secrets.

18 U.S.C. § 1905 prohibits the disclosure of "trade secrets, processes, operations, style of work, or apparatus or the identity of confidential statistical data, a minor source of income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association. . . ." It also imposes criminal penalties for violations.

E. Federal Rules of Criminal Procedures 6(e).

Federal Rules of Criminal Procedure 6(e)(2) codifies the common law rule that permits disclosure of "*matters occurring before the grand jury*" only "when so directed by the court preliminary to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e) (emphasis added). *See generally* ABA Antitrust Section, *Antitrust Evidence Handbook* 81-87 (1991). Under Rule 6(e), a litigant must demonstrate "particularized need" to obtain grand jury transcripts for use in another judicial proceeding. *Id.* Rule 6(e) contains five exceptions to the general rule on non-disclosure:

a. Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to-

   (1) an attorney for the government for use in the performance of such attorney's duty; and

   (2) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

* * *

b. Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made-

   (1) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(2) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(3) when the disclosure is made by an attorney for the government to another federal grand jury.

Significantly, Rule 6(e) does not impose any obligation of secrecy on grand jury witnesses. Nor does it preclude production of documents produced to the grand jury, provided the documents are sought from the producing party. *Id.* Although the language of Rule 6(e) is ambiguous regarding foreign governments, the Ninth Circuit has rejected the notion that disclosures to foreign governments could be made by U.S. government attorneys. *In re Federal Grand Jury Witness (Lemieux)*, 597 F.2d 1166, 1168 (9th Cir. 1979). Instead, the court concluded that disclosure to foreign authorities requires a U.S. District Court to order disclosure. The parties seeking disclosure must satisfy a three part test:

- The material must be sought to avoid possible injustice in another judicial proceeding;
- The need for disclosure must outweigh the need for continued secrecy; and
- The disclosure request must be limited to the material necessary to avoid injustice.[12]

The U.S. Supreme Court has indicated, however, that convenience or cost savings alone will not satisfy the test and that the requesting party must first exhaust traditional discovery and investigation techniques. *Smith v. United States*, 423 U.S. 1303, 1304-05, *stay vacated on other grounds*, 423 U.S. 810 (1975); *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 431-35 (1983).

More recently, however, disclosure of materials produced in response to a grand jury subpoena to foreign enforcement officers has occurred where the

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[12] *See generally* ABA Antitrust Section, *Antitrust Evidence Handbook* 81-87 (1991); Note, *Disclosure of Grand Jury Materials to Foreign Authorities Under Federal Rule of Criminal Procedure 6(e)*, 70 Va. L. Rev. 1623, 1629 (1984) (*citing Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), and *United States v. Baggot*, 463 U.S. 476 (1983).

materials were in the possession of the U.S. attorney, but not yet presented to the grand jury. Courts have allowed the disclosure because the materials were not yet in the possession of the grand jury, and therefore were found not to be subject to Rule 6(e). *See, e.g., United States v. Peters*, 791 F.2d 1270 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986); *see generally* Note, *supra*.

The testimony of many grand jury witnesses is compelled over an assertion of the Fifth Amendment privilege against self-incrimination through grants of statutory immunity. *See* ABA Antitrust Section, *Antitrust Evidence Handbook* 106-8 (1991). Statutory immunity precludes U.S. prosecution of the grand jury witness based on evidence derived from the immunized testimony. *Id.* However, if a witness' immunized grand jury testimony is disclosed to a foreign antitrust agency with criminal prosecution authority (such as Canada), the IAEAA contains no provisions to insure that the witness will not be prosecuted in the foreign jurisdiction based on immunized testimony before a U.S. grand jury. The Task Force recommends that this deficiency be addressed through amendments designed to insure that immunized U.S. witnesses receive equivalent immunity from any foreign antitrust agency to whom their testimony is disclosed. [13]

III. PRECEDENT FOR PROPOSAL AND EXISTING MEANS OF COOPERATION.

A. Securities Law Cooperation.

Representatives of the Department of Justice have stated that the proposed IAEAA is patterned after legislation enacted in 1988 providing for

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[13] Section 4(c) of the IAEAA provides that "a person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable right or privilege." However, the term "privilege" is not defined. The Task Force recommends an amendment to require an assurance that an immunized grand jury witness cannot be criminally prosecuted by a foreign antitrust agency based on immunized testimony. In addition, the term "privilege" should be clarified to insure that other privileges, such as the attorney-client privilege, are given their full scope by a foreign agency. At present, some foreign jurisdictions, such as the EC, do not recognize the attorney-client privilege to the same extent as the U.S.

international cooperation in securities law enforcement. The 1988 statute empowers the SEC to investigate on behalf of a foreign securities authority:

> On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States. [15 U.S.C. § 78n(a)(2)].

Additional legislation was enacted in 1990 to strengthen further international cooperation in the enforcement of securities laws. It provides that:

> The Commission may in its discretion and upon a showing that such information is needed provide all "records". . .and other information in its possession to such persons, both domestic and foreign, as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate. [15 U.S.C. § 78x(c)].

Executive Agreements have been entered into between the U.S. and approximately 15 foreign authorities under this legislation.[14] The SEC has received substantial

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[14] Similar legislation has been enacted by several other countries, including the U.K., France, Japan, the Netherlands, Australia, Mexico, and some Canadian provinces.

cooperation in its investigations from foreign governments. The SEC makes more than 200 requests for foreign assistance each year.[15]

B. **28 U.S.C. § 1782.**

An existing U.S. law, 28 U.S.C. § 1782, authorizes the federal courts to enter orders for the taking of testimony and other information gathering for potential use in a proceeding before a foreign "tribunal." It constitutes the principal existing mechanism whereby foreign authorities might secure evidence in the United States to assist their investigation of possible foreign-law violations.

However, this provision is limited in several respects. First, it is not clear whether a foreign authority operating purely through administrative process without judicial involvement would constitute a tribunal for purposes of Section 1782. Second, certain investigative process available to U.S. agencies, such as the Antitrust Civil Process Act, would not be available to foreign authorities since that process is limited to use in investigation of offenses under the U.S. antitrust laws. Finally, the requirement of a court order in each instance involves some element of delay in the investigatory process. As a result, CIDs and court ordered discovery are not now practically available to assist in foreign investigations.

C. **Mutual Legal Assistance Treaties.**

The United States has entered into approximately 20 Mutual Legal Assistance Treaties ("MLATs") with foreign authorities providing for cooperation in investigations of criminal conduct, which may include antitrust offenses. *See* Remarks of Assistant Attorney General Anne K. Bingaman before the World Trade Center Chicago Seminar, p. 12 (May 16, 1994). The most significant such agreement, which expressly includes antitrust offenses, is the Treaty on Mutual Legal Assistance in Criminal Matters between the United States and Canada. It provides for cooperation in criminal investigations, including use of process and the exchange of documents and other materials obtained through the grand jury process. A court order is required for materials subject to Rule 6(e). This agreement is being actively implemented. *See* Address of Assistant Attorney

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[15] Letter dated June 13, 1994, to Deputy Assistant Attorney General Diane Wood from Michael D. Mann, Director of Office of International Affairs, the Securities and Exchange Commission.

General Anne K. Bingaman before the World Trade Center Chicago Seminar, *supra*, at 12.

The U.S.- Canadian MLAT has proved to be a significant aid to U.S. antitrust enforcement. With the assistance of the Canadian government, DOJ has secured evidence essential to criminal antitrust prosecutions. Most recently, DOJ indicted Japanese firms for conspiring to fix the price of thermal fax paper, based in part on information from the Canadian government, which filed similar charges.[16]

However, the MLATs have limitations that prevent them from being fully effective mechanisms of enforcement cooperation. First, they are limited to criminal enforcement. Nations and multinational bodies that do not have statutes with criminal sanctions are likely to be averse to cooperating in U.S. antitrust investigations looking to criminal prosecution. It is doubtful, moreover, whether under an MLAT, the U.S. Antitrust Division could cooperate with a civil antitrust investigation being conducted by a foreign agency. In addition, treaties such as the MLATs require extensive multi-agency involvement and, in the United States, ratification by the Senate. As a result, the process is time-consuming and somewhat cumbersome.

The important point, however, is that DOJ's experience under the MLATs strongly suggests that reciprocal antitrust investigatory cooperation is possible and can be effective. Indeed, experience under the MLATs, as well as frustration over investigations that failed when foreign evidence proved unavailable, motivated DOJ to propose the IAEAA.

D. Existing U.S. Agreements for Antitrust Cooperation.

The U.S. and several other industrialized nations have negotiated executive agreements for cooperation that provide partial models for the bilateral agreements contemplated by the IAEAA.

An agreement was negotiated with Germany in 1976.[17] It provides for notification and consultation between governments when an antitrust investigation

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[16] United States v. Kanzaki Specialty Papers, Inc., Crim. No. 94-10176NMG (D. Mass. July 14, 1994). Similarly, DOJ recently indicted manufacturers of plastic tableware based in substantial part on evidence obtained by the Canadian government at the request of DOJ. Wash. Post (June 10, 1994).

[17] Agreements Between the Government of the United States and the Government of the Federal Republic of Germany Relating to Mutual Cooperation

[Footnote continued]

or proceeding "will be likely to affect important interests of the other party" and consultations will be held "to the extent appropriate under the circumstances." Similar agreements exist between the U.S. and Canada[18] and between the U.S. and Australia.[19]

Most recently, the U.S. and the EC entered into an agreement for cooperation and deference, including the exercise of positive comity, in antitrust and competition matters.[20] However, it expressly does not authorize the sharing of information protected by statutes or regulations of either party. Nor does it provide for use of compulsory process at the request of the other party. As a consequence, its utility has been somewhat limited.[21] Nonetheless, DOJ and the EC recently

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[Footnote continued]

Regarding Restrictive Business Practices, *reprinted in* 772 Antitrust & Trade Reg. Rep. (BNA) D-1 (July 13, 1976).

[18] Memorandum of Understanding Between the Government of the United States and the Government of Canada as to Notification, Consultation and Cooperation with Respect to Application of National Antitrust Laws, *reprinted in* 46 Antitrust & Trade Reg. Rep. (BNA) 560 (March 15, 1989).

[19] Agreement Between the Government of the United States and the Government of Australia Relating to Cooperation on Antitrust Matters, *reprinted in* 43 Antitrust & Trade Reg. Rep. (BNA) 36 (July 1, 1982).

[20] Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws (Sept. 23, 1991), *reprinted in* 61 Antitrust & Trade Reg. Rep. (BNA) 382 (Sept. 26, 1991). The validity of this Agreement is currently in doubt because of litigation pending before the European Court of Justice.

[21] For example, the FTC and EC consulted concerning about such issues as product and geographic market definition in the proposed DuPont-ICI transaction. But their ability to discuss other issues was limited to matters not subject to confidentiality requirements. Recently, the EC and DOJ asked the parties to a proposed merger to waive HSR Act confidentiality requirements to permit more extensive cooperation with the EC.

settled jointly monopolization/abuse of dominant position claims against Microsoft. [22]

While these agreements generally authorize consultation and cooperation, they have fallen short of the goal of promoting effective enforcement because they fail to authorize the sharing of confidential information that either signatory has gathered during an investigation. Nor do they provide for positive cooperation in information gathering at the request of either signatory. These are the gaps that the IAEAA seeks to fill.

IV. RECOMMENDATIONS.

A. Potential Benefits of the Legislation.

The Task Force recommends that the Antitrust Section support enactment of the IAEAA, subject to certain modifications. The information-sharing provision of the IAEAA is fully consistent with the recommendations of the Report of the Section's 1991 Special Committee on International Antitrust and the Section's 1994 NAFTA Report.[23] (*See* p. 2 *supra*.) Moreover, the investigatory cooperation proposal stems from the same goal of enhancing cooperation and effective enforcement between competition agencies with respect to conduct having transnational ramifications. This objective is also consistent with the conclusion of the Report of the Special Committee on International Antitrust and the NAFTA Report that convergence in enforcement and administrative process and procedure is a primary desirable step in the elimination of costs and frictions in the governmental assignment of competition. American Bar Association Section of

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[22] Wash. Post A1 (July 18, 1994). The U.S. - EC coordination was achieved with the consent of Microsoft.

[23] The proposed legislation is also consistent with recommendations of the Organization for Economic Cooperation and Development, which has long recommended more cooperation among member nations in competition law matters. In 1979, the OECD issued a report that recommended information sharing among members. OECD, *Concentration and Competition Policy* (1979). In 1978, an OECD Council recommendation urged members to disclose information, subject to appropriate safeguards, unless cooperation would be contrary to significant national interests. OECD, *Recommendation of the Council Concerning Action Against Restrictive Business Practices Affecting International Trade Including Those Involving Multinational Enterprises* (Aug. 9, 1978).

Antitrust Law, *Report of the Task Force on the Competition Dimension of the North American Free Trade Agreement* (March 25, 1994); American Bar Association Section of Antitrust Law, *Report of the Special Committee on International Antitrust* (Sept. 1, 1991).

There also are several other benefits that could result from the enactment of the IAEAA.

First, and perhaps most important, the proposed legislation will strengthen the ability of the Antitrust Division and FTC to attack conduct overseas that violates U.S. antitrust laws. As a result, it will assist their efforts to protect U.S. consumers. Because they will be able to offer meaningful reciprocal cooperation to foreign agencies, it is more likely that the DOJ and FTC can induce many of their foreign counterparts to enter into genuine cooperation efforts to enhance both U.S. and foreign antitrust enforcement. If this goal is realized, it could provide a more meaningful mechanism for challenging private restraints on competition here and abroad that block market access to U.S. firms.

Second, more effective antitrust law enforcement should help all markets -- both in the U.S. and abroad -- operate more efficiently. Eventually, more effective foreign antitrust enforcement against foreign cartels and other barriers to entry, might help open foreign markets to U.S. firms. Foreign firms that restrict access to their markets by U.S. firms could be held accountable under foreign competition laws based on information provided by U.S. antitrust agencies. This could help "level the playing field" in international trade because foreign firms, like their U.S. counterparts, would be subject to more vigorous antitrust enforcement.

Finally, the better coordination sought by both elements of the proposal could produce better, more rational outcomes in dual investigations. Improved investigatory cooperation and data sharing facilitate an in-depth, thoughtful exchange of views and understanding of transnational implications of enforcement action. Resultant governmental action, by U.S. as well as foreign enforcers, would likely be better informed and hence be less intrusive than in the absence of such mutual deliberation.

The key to realizing the goal of the IAEAA, of course, is the willingness of foreign governments to enter into agreements providing for genuine reciprocity. The Task Force did not believe its purview included the practical question of whether that reciprocity would readily be forthcoming. Nonetheless, it seems clear that for the proposal to be both effective and acceptable to various U.S. constituencies, the DOJ and the FTC would need to secure express commitments from their foreign counterparts of genuine reciprocal undertakings and have a high degree of confidence that these undertakings would be honored.

B. Confidentiality Concerns.

The Task Force's principal concern about the IAEAA is the extent to which a foreign antitrust agency will safeguard the confidentiality of information received from the DOJ or the FTC. The IAEAA requires the U.S. agencies to take into account whether the foreign agency will give "adequate protection" to confidential information "at least equivalent to the treatment" under U.S. law. As introduced, the bill addresses many of the concerns of the Task Force about confidentiality. The Task Force applauds DOJ for its responsiveness to these concerns.

Adequate safeguards to protect the confidentiality of sensitive business information are of paramount concern, and the Antitrust Section's support for this kind of legislation is contingent upon having adequate protection. Confidential information is accorded the very highest protection by the U.S. antitrust enforcement agencies. The business community through the years has developed great confidence that sensitive competitive records turned over to the agencies will not be disclosed to outsiders, especially to competitors. U.S. firms would expect an equivalent level of protection in the international arena for business records turned over to foreign enforcement authorities or used in foreign tribunals.

This overriding need for confidentiality in any international exchange program cannot be overstated. The global nature of competition today, and the intense rivalry that exists between U.S. and foreign firms, both in the United States and throughout the world, makes this a paramount issue. If sensitive business records of a U.S. company were provided to a foreign competitor by its government, the consequences for the U.S. firm could be grave. Strategic plans, new product and cost information, and competitive analyses are a few of the types of information whose disclosure to competitors could cause irreparable harm to U.S. firms.

Therefore, while the concept of international information exchanges to enforce the competition laws is commendable, the Task Force believes the IAEAA must address this fundamental concern and safeguards must be included in the legislation.

The IAEAA should specify broadly the parameters of confidentiality assurances that would be a prerequisite to information sharing by U.S. agencies. Such requirements might include the following:

- The statutory or regulatory confidentiality safeguards available to foreign agencies;

- The limited scope of mandatory disclosure under foreign laws or regulations, *e.g.* disclosure to other agencies or use in regulatory proceedings;[24]

- The enforcement mechanisms and sanctions (criminal or otherwise) for violation of foreign confidentiality laws or rules and the foreign agency's commitment to their enforcement;

- The availability of processes for confidential use of information by the foreign agency, *e.g. in camera* review procedures;

- A requirement that access to U.S. information be terminated in the event confidential U.S. information is not protected,[25] but subject to an opportunity for the foreign agency to cure the deficiencies that allowed disclosure;

- An explicit assurance that the information will not be used for commercial purposes;

- Where firms that compete with U.S. firms are wholly or partially owned by a foreign government, there should be special protections against disclosure;

- The foreign agency should undertake not to disclose confidential information except to the extent necessary to enforce its antitrust laws and to assist the producing party in seeking confidential treatment;

- In order to insure that confidentiality is protected, the bill should state explicitly that no confidential information can be disclosed unless, through the bilateral agreement and otherwise, DOJ and FTC are confident that the foreign agency will afford the disclosed information the level of confidentiality required by the IAEAA; and

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[24] This may pose a particular problem in the European Union because information disclosed to the European Commission must be disclosed to all member states.

[25] In the event a U.S. agency learns that foreign disclosure has occurred, it should so advise the U.S. firm that produced the documents or information.

- If DOJ and FTC are aware of any provisions of the law of the foreign jurisdiction to whom the information will be disclosed that call into question its ability to maintain confidentiality, those provisions should be described in the notice requesting public comments.

Many of these provisions have been included in the bill as introduced. Those matters not addressed should be added through amendments. In addition, references to the importance of confidentiality should be added to the bill's preamble.[26]

Nonetheless, while the bill should emphasize the importance of confidentiality and provide minimum confidentiality standards, it seems unnecessary for Congress to resolve detailed confidentiality issues through the legislative process. Instead, the Task Force recommends that the legislation be amended to provide that the bilateral agreements executed by the U.S. agencies require explicit and detailed assurances that documents and other information will be protected.[27] The Task Force further recommends that the bill be amended to require that the scope of acceptable assurances be identified in regulations to be issued by the Department of Justice, in consultation with the FTC, after notice and opportunity for comment.[28]

C. Other Suggested Amendments.

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[26] The bill introduced in the Senate adopted the Task Force's suggested addition of the following two findings to the preamble of the IAEAA:

(6) The effectiveness of antitrust enforcement in the United States has been enhanced by government guarantees of confidentiality, which encourage the voluntary disclosure of business information; and

(7) Credible guarantees of confidentiality from foreign antitrust authorities are essential for the preservation of competition and the continued effective collection of business information.

[27] This recommendation is consistent with the recommendations of the Section's *1994 NAFTA Report*, which stresses the need for confidentiality.

[28] The Task Force believes there should be formal notice and comment rulemaking proceedings, subject to judicial review. The bill as introduced requires public notice and comment as to proposed agreements, but no judicial review.

In addition, the Task Force recommends several other amendments to the IAEAA.

First, as noted above, as drafted the bill refers to bilateral agreements only in passing. The IAEAA should specifically authorize and require execution of bilateral agreements for reciprocal cooperation and information sharing as a condition for U.S. cooperation and information sharing.[29] Such agreements should contain explicit and detailed confidentiality provisions. Even after execution of such agreements, prior to disclosure of information by U.S. agencies, they would be required to evaluate the likelihood of reciprocal cooperation, confidentiality, and whether cooperation or disclosure is in the public interest. As introduced, the bill addresses some of these issues.

Second, the IAEAA should authorize explicitly disclosure to foreign competition agencies of information obtained through CIDs or FTC compulsory process.

Third, the Task Force recommends that disclosure of immunized grand jury testimony be conditioned on assurances that the immunized witness cannot be criminally prosecuted by the foreign agency based on the immunized testimony.

Fourth, the Task Force recommends that the term "privilege" be defined to assure that foreign antitrust agencies accept the broadest applicable scope of privileges (as recognized either in the U.S. or the foreign jurisdiction), such as the attorney-client privilege, for materials disclosed pursuant to the IAEAA.

Finally, in order to allow Congress to evaluate the utility of the legislation and the extent to which foreign agencies have maintained the confidentiality of U.S. information, the FTC and DOJ should periodically file reports with Congress.[30] Such reports should include such matters as: the number of bilateral agreements in force; whether foreign nations have enacted comparable legislation; the annual number of requests for cooperation or disclosure made by DOJ, FTC, and foreign agencies; the annual number of instances of actual cooperation or disclosure by DOJ, the FTC, and foreign agencies; whether

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29 For example, Sections 4 and 5 of the bill should refer to such agreements as a condition for U.S. cooperation or assistance.

30 The Task Force recommends that the first report be filed four years after the effective date of the IAEAA and thereafter every four years. As introduced, the IAEAA provides for a single report four years after enactment.

information obtained under the IAEAA has facilitated antitrust enforcement by the U.S. and foreign agencies; and an evaluation of the effectiveness of confidentiality commitments of foreign signatories. These reports also should be available to the public.

CONCLUSION

In sum, the IAEAA is a solid, if modest, step in the direction of desirable global cooperation in competition issues, which has ever increasing significance in an economically interdependent world. If genuine reciprocity can be achieved, the IAEAA can promote both the efficiency and legitimate reach of U.S. antitrust enforcement. While the Task Force has identified important concerns, particularly with respect to confidentiality, it believes they can be resolved as proposed by the Task Force. The Task Force believes this measure should be supported by the Section, with modifications as indicated.

Mrs. SCHROEDER. Thank you very much.
Mr. Blechman.

STATEMENT OF MICHAEL D. BLECHMAN, CHAIRMAN, COMPETITION COMMITTEE, U.S. COUNCIL FOR INTERNATIONAL BUSINESS

Mr. BLECHMAN. Thank you, Madam Chairman.

The U.S. Council and I are both appreciative of having this chance to have our views heard on this bill. Like the other business organizations that have testified about it in the Senate, the U.S. Chamber, the National Association of Manufacturers, we are generally supportive of the idea of having coordination internationally among antitrust enforcement agencies, and therefore we basically support the goals and the purposes of this bill.

Our concerns, like the main concerns of those other organizations, are with the issue of confidentiality, and the possibility that American trade secrets and American confidential information will find its way into foreign hands in ways that is going to hurt American companies and hurt American competitiveness generally.

We are particularly concerned that it is possible that that will happen without notice, and there are situations in which it will happen without notice, and without judicial review, and there are situations in which it can happen as is expressly provided in the bill without judicial review.

So this is an area in which, as Congressman Fish suggested, we believe that more can be done. Let me start by reviewing the kind of information that we are talking about and the kind of communication whose confidentiality we are concerned with.

First of all, we are not talking about information of criminals or potential criminals or even people who are accused of violating any law of the United States. We are talking about information being given to foreign countries that is information supplied by American companies who have not been accused of anything, who are just being suspected, perhaps, of having violated some foreign antitrust law.

So this is not cartel behavior, this is not criminal behavior. These are innocent parties, essentially, whose information is being shared in the hope of getting information from foreign countries to prosecute other people who may be criminals. But the information we are talking about is information of innocent parties.

The second thing is, this is different from the kind of information that is shared under SEC memoranda of understanding. This is not information as to who made trades, banking information, brokerage information about past business dealings.

This is typically the kind of information the Justice Department, the FTC obtains in an antitrust investigation, is the most sensitive, competitively harmful if it falls into a competitors' hands, information that a company may have. It is plans for new products, new R&D plans on the drawing boards, the kind of thing if it falls into the hands of a powerful foreign competitor can mean the loss of a whole line of business, hundreds of millions or perhaps billions of dollars and thousands of American jobs. That is the thing we are concerned about.

Now, that kind of information is currently protected under, for example, the Antitrust Civil Process Act and the FTC Act, in that when that information is obtained by the Justice Department or the FTC today, it can't be shared with anyone without the consent of the party whose information it is, except Congress.

And even with Congress, the party has to get notice first. So this bill would actually allow the FTC and the Justice Department to give information to foreign agencies under circumstances less rigorous than when it is given to our own Congress.

There is a possibility here and a real danger that it will be given without notice and without judicial review. For example, if a party shares information with the Justice Department voluntarily as part of an investigation, or the Justice Department obtains it by means of a civil investigative demand in an investigation of its own, under section 8 of this bill, if the FTC or the Justice Department so determines that the standards are met in their sole discretion, they can share that information with a foreign antitrust enforcement agency without going to a judge because there is no need to obtain a new CID, as when they are specifically seeking to obtain information for a foreign power, and without any kind of notice or judicial review at all.

In fact, section 9 of the bill specifically provides that determinations under 8(a) are not subject to judicial review. Determinations by the FTC or the Justice Department to share information that they have previously obtained with foreign agencies are not subject to judicial review. That is a very unusual provision and excludes any kind of protection for the company whose secrets are being shared.

Now, let's also consider with what countries we are talking about sharing this information. We are not necessarily talking about Canada or the EC. If that is all that was involved here, there could be treaties duly concluded with the advice and consent of the Senate.

We are talking about having an enforcement agency, without any checks and balances, enter into agreements, memoranda of understanding with any country that has antitrust laws "similar," whatever that means, to the U.S. antitrust laws.

The number of countries that includes is expanding dramatically, exponentially, and every week there are new ones. I asked someone in our office to list some of the countries that presently have antitrust laws: Bulgaria, the Czech and Slovic Republics, Hungary, India, Pakistan, Peru, Poland, Russia, Venezuela, Zimbabwe. I myself worked with the Central and Eastern European Law Institute of the Bar Association on the Croatian antitrust laws. I have reviewed the Romanian antitrust bill. Virtually every country in the former Soviet bloc and most of the Third World now have antitrust laws.

Maybe it is not meant or intended that these are to be countries the Justice Department or FTC will enter into MOU's with. But if the only thing we are concerned with are MOU's with a few countries like Canada, like the EC, that can be done with treaties, and presumably the reason for this bill is so that a much wider net can be cast so that the Justice Department and the FTC can obtain information from a much wider variety of countries.

Some of those countries have very strong industrial policies. Their policies, the view of the obligations of their states, is to try and help their industries against (among others) the U.S. companies, and they therefore have a very strong reason for wanting to share American confidential information with their own nationals. And it's no secret that some of these countries don't have incorruptible bureaucracies, so for a variety of reasons there is a real danger here that very important American trade secrets worth hundreds of millions or billions of dollars will find their way into foreign hands and there will be real damage to the American economy.

If that happens, what are the remedies under this bill? As was pointed out before, there is no damage remedy. There is no criminal liability as there is under some of the other statutes. The only remedy that a company that has lost its trade secrets has is the right to be informed after the confidentiality of its information has been violated, and after its secrets have already been shared with its competitors and the damage has already been done, that this is what has happened.

Then, perhaps after 3 years, when a report is made to the Congress, that fact and the number of other occasions in which confidential information has leaked, will be revealed. But that is hardly a meaningful remedy for the innocent party whose trade secrets have been compromised.

So what do we propose to do about this problem? Our suggestion is simple.

First of all, we suggest that before a company—and again we are talking about innocent companies here who haven't violated American law—can have its trade secrets shared with a foreign power, that company should be given notice of what is about to happen and a chance to object.

Now, there may be cases involving real criminal cartel behavior where there is a true need for maintaining the secrecy of an investigation. But, that can be dealt with. You can have separate kinds of provisions for real criminal behavior where, for example, the Justice Department can go to a judge or get an order allowing information to be shared without notice where, for example, there is probable cause to believe a crime has been committed and that disclosure of the investigation will seriously compromise law enforcement.

But this bill goes way beyond that. It allows trade secrets to be shared, where the parties involved are totally innocent and there is no hint of any kind of cartel behavior or other kind of criminal conduct.

The other suggestion that we make is that, once a party has notice, give it a chance to go into court if it wants to seek a temporary restraining order or preliminary injunction, you can make the standard a very high one, e.g., abuse of discretion, so as not to interfere with the normal operation of the bill. Perhaps there would be very few cases in which a company could meet that standard, but where there is an abuse of discretion, what is lost by giving such a company at least that right to try?

The main problem we have with this bill is, unlike virtually any other legal regime I can think of, there are no checks and balances. There is no check or balance from the Congress. There is no check

or balance from any court in many situations in which this bill may be utilized.

In our view, this bill would not be "gutted," but rather will be helped by restoring some of those checks and balances so that innocent companies will have at least some chance to prevent their trade secrets from being shared in inappropriate cases with foreign competitors.

Thank you.

Mrs. SCHROEDER. Thank you very much, Mr. Blechman.

[The prepared statement of Mr. Blechman follows:]

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United States Council for International Business

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The ATA Carnet System

August 2, 1994

The Honorable Jack Brooks
Chair, Subcommittee on Economic
and Commercial Law
B 353 Rayburn House Office Building
Washington, D.C. 20515-6221

Dear Chairman Brooks:

On behalf of the United States Council for International Business (U.S. Council), we wish to submit the following comments and suggestions with respect to S. 2279, the International Antitrust Enforcement Assistance Act of 1994 (IAEAA), which is scheduled for hearings on Thursday, August 4, 1994.

Dedicated to promoting an open system of world trade, finance and investment, the U.S. Council, with a membership of some 300 major multinational companies trading and investing globally, represents American business positions in the major international economic policy-making institutions and before the U.S. Government. The U.S. Council is the U.S. affiliate of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee (BIAC) to the OECD, and the International Organisation of Employers (IOE). As such, it is the official representative of American business in the key intergovernmental bodies influencing international business, including the United Nations, the Organisation for Economic Cooperation and Development (OECD), the International Labor Organization (ILO), and the European Union.

The U.S. Council supports the proposed legislation's aim of encouraging and facilitating multilateral and bilateral cooperation in the investigation and enforcement of antitrust laws. We are, however, concerned about the lack of adequate safeguards in the legislation for the protection of trade secrets and other confidential and proprietary information. Since the absence of such safeguards could do serious harm not only to individual companies, but also to the competitiveness of American business generally, we are proposing an amendment to the bill to address this concern.

Thank you for taking the time to consider our comments on this important matter. Please do not hesitate to contact us if we can be of any further assistance.

Sincerely,

Abraham Katz
President
U.S. Council for International Business

Michael D. Blechman
Partner
Kaye, Scholer, Fierman, Hays & Handler

STATEMENT OF THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS ON THE INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT OF 1994 (IAEAA)

The U.S. Council for International Business supports the aim of S. 2279, the International Antitrust Enforcement Assistance Act of 1994 ("IAEAA"), to encourage and facilitate multilateral and bilateral cooperation in the investigation and enforcement of antitrust laws. We are, however, concerned about the lack of adequate safeguards in the legislation for the protection of trade secrets and other confidential and proprietary information. Since the absence of such safeguards could do serious harm not only to individual companies, but also to the competitiveness of American business generally, we are proposing an amendment to the bill to address this concern.

The proposed legislation would authorize the Attorney General and the Federal Trade Commission to provide evidence to a foreign antitrust authority under a mutual assistance agreement. IAEAA § 2. As we know from antitrust investigations within the United States, this evidence frequently includes sensitive pricing data, new product and cost information, competitive analyses, strategic plans, trade secrets, and other confidential and proprietary information that must not be disclosed to competitors. For this reason, the Antitrust Civil Process Act and the Federal Trade Commission Act provide well-established procedures to prevent improper disclosures of information obtained by the Attorney General and the Federal Trade Commission during an antitrust investigation.

The Antitrust Civil Process Act and the FTC Act provide that a custodian must be appointed who shall be responsible for maintaining confidential information and ensuring its return to the company that provided it upon completion of the investigation. See 15 U.S.C. § 1313; 15 U.S.C. §57b-2. These statutes provide that no documents or other evidence may be disclosed to any individual other than an authorized official, employee or agent of the Department of Justice, or in the case of materials maintained by the Federal Trade Commission, an authorized officer or employee of the FTC, without the consent of the company that provided the materials. See 15 U.S.C. § 1313 (c) (3); 15 U.S.C. § 57b-2(c). While the statutes provide that disclosures may be made to either House of Congress, or to a committee or subcommittee of the Congress, the owner or provider must be notified of such disclosures. See 15 U.S.C. § 1313 (c) (3); 15 U.S.C. § 57b-2(c).

In contrast to the restrictions imposed on the Attorney General and Federal Trade Commission with respect to disclosures of confidential information to the Congress and authorized employees of the U.S. Government, the IAEAA would permit the sensitive commercial information to be turned over to a foreign agency without notice to the company that owns or provided the information.

It is true that, under the IAEAA, the U.S. antitrust authority involved would be required to obtain an "assurance" from the foreign agency that it is subject to laws and procedures adequate to maintain the confidentiality of the information and will afford it a level of protection not less than what is provided by U.S. law (IAEAA § 12(2) (B)). However, the person whose information is being shared would have no say in the entire process. Indeed, a company that provided confidential information to the Attorney General or the FTC would be notified of its

release to a foreign agency only in the event the foreign agency violated its "assurance" of confidentiality, and then only after the violation had occurred. IAEAA § 12(2) (G). Moreover, the Attorney General's determination that the foreign agency's "assurance" was adequate would not be subject to judicial review. IAEAA § 9(a).

The disclosure of sensitive commercial information to a foreign agency without notice and an opportunity to be heard raises serious concerns. As an initial matter, the foreign agencies that would receive confidential information may have very different concepts of "confidentiality" than we have in the United States. For example, under the Treaty of Rome, information that is provided to the European Community must be disclosed to all member states. Moreover, the nations and regional economic organizations that have adopted antitrust laws that are arguably "similar" to the United States -- and with which the confidential information of U.S. companies may therefore be shared -- include not only our traditional allies and trading partners, but also many developing nations and former communist states such as Bulgaria, the Czech and Slovak Republics, Hungary, India, Pakistan, Peru, Poland, Russia, Sri Lanka, Venezuela and Zimbabwe. Many other states, such as Croatia, the Philippines and Rumania, are in the process of adopting their own antitrust laws.

Once the information is released to an agency in one of these countries, it will be impossible to keep track of who has had access to it. This is particularly true if, as the present IAEAA provides, the company is not even informed that its information has passed into foreign hands. If one also considers that many countries that now have (or may soon adopt) antitrust laws have strong policies in favor of improving the competitiveness of their own national industries, including their competitiveness vis-a-vis U.S. companies -- as well as the fact that some of these countries may have bureaucracies that are not totally incorruptible -- it is clear that the danger that U.S. trade secrets may be lost is not merely a theoretical one.

Disclosure of sensitive commercial information without notice to the company that provided the information also raises the prospect that the Attorney General or the Federal Trade Commission may release information which they might not have released if they had the benefit of the company's views. In many fields, particularly very technical areas where trade secrets and proprietary information are most important, input from the company that provided the information may be essential to fully understand the implications of revealing certain data to a competitor.

We recognize that extensive notification and judicial review procedures would defeat the purpose of the IAEAA to facilitate the exchange of information between enforcement agencies in the United States and elsewhere in the world. Accordingly, we propose only an amendment of the IAEAA to provide notice to the company whose information will be released, a very short time frame to object to that release, and an expedited judicial review procedure that would override a decision by the Attorney General or the FTC only in the case of an abuse of discretion. The following is proposed language for this amendment:

Sec. X Notice of Disclosure to a Foreign Antitrust Authority

(a) Notice Required -- Not less than 45 days before disclosing antitrust evidence to a foreign antitrust authority under Section 2, 3, or 4, the Attorney General or the Commission, as the case may be, shall provide notice to the person

(if any) that provided such evidence to the Attorney General or the Commission. Such notice shall be given by overnight mail or equivalent means and shall include:

(1) a description sufficient to permit identification of the antitrust evidence to be disclosed;
(2) the identity of the foreign antitrust authority, and
(3) the proposed date of disclosure.

(b) Objections – If the person to whom the notice in subsection (a) is provided objects in writing to the Attorney General or the Commission, whichever provided the notice, within 15 days of receiving such notice, no disclosure under this Act shall be made unless, at least 15 days prior to the disclosure of such evidence, the Attorney General or the Commission makes a written decision rejecting the objection, indicating the grounds therefor, and finding that (i) the information may be disclosed under the Act, and (ii) the foreign antitrust authority is subject to laws and procedures that are adequate to maintain the confidentiality of antitrust evidence and will give protection to the antitrust evidence that is not less than the protection provided under the laws of the United States to such antitrust evidence.

(c) Judicial Relief – Any persons who believe they are adversely affected by such a decision may bring a judicial proceeding for a preliminary injunction or temporary restraining order to enjoin disclosure of the information in question upon a showing that the aforesaid decision represents an abuse of discretion, and that the other legal requirements for obtaining such relief are satisfied.

We submit that this amendment will help to alleviate the legitimate concern that the confidential and sensitive commercial and proprietary information will be misused while only minimally inconveniencing the antitrust agencies involved.

We recognize that the concerns we have raised with respect to the IAEAA are not unique to this bill, but may apply as well to certain other vehicles for cooperation among law enforcement agencies. In this particular context, however, we believe that these concerns may be addressed without undermining the essential goals which the bill is intended to achieve.

Mrs. SCHROEDER. Mr. Goldfarb, the floor is yours.

STATEMENT OF LEWIS H. GOLDFARB, ASSISTANT GENERAL COUNSEL, CHRYSLER CORPORATION

Mr. GOLDFARB. Thank you, Madam Chairman. I appreciate the opportunity to testify here on behalf of Chrysler Corporation.

I would ask that our statement be submitted for the record and I will just very briefly go through some of the reasons for Chrysler's interest in this legislation and why we believe it will have a major impact on international antitrust enforcement.

Chrysler is one of the three largest U.S. exporters of goods overseas. We actually export more vehicles overseas than General Motors. In 1994, we will export more than 200,000 vehicles overseas and manufacture nearly 40,000 minivans at our new plant in Graz, Austria.

Our presence in Europe is roughly equivalent to BMW's presence in the United States. As our products have gained popularity worldwide, we have become very concerned with anticompetitive barriers to distributing our cars and trucks overseas. The problem is we have trouble getting dealers to sell our products because foreign manufacturers exercise restraints over their dealers.

I would just like to give two examples of that, very briefly, if I may. I am sure you are all familiar with the Moss Study, which was published back in February, a joint study between our Commerce Department and Japan's Ministry of Trade. That study, which took about 2 years, found that Japanese automobile manufacturers do not permit their dealers to sell vehicles of competing manufacturers, particularly importers.

This has made it very difficult for U.S. manufacturers to sell products in Japan. We have less than a 3-percent share of the Japanese market while the Japanese have over 24 percent of the U.S. market. And this is a finding of both the U.S. and Japanese Governments, and yet the practice continues and the Japan Fair Trade Commission doesn't appear to be doing anything about it.

The second concern has to do with the block exemption in Europe. There is an exemption to European competition law, which permits manufacturers to have the same kind of control over dealers in Europe as exists in Japan. That exemption is coming up for renewal next year, and we understand that exemption will be weakened considerably.

We are looking forward to gaining access to European dealers, however, we have real concerns that, in fact, this will not come to pass, notwithstanding the narrower exemption. We would like to see some greater enforcement in Europe that we reduce the impediments to our access to European dealers.

We believe that H.R. 4781 would enable our antitrust enforcers to gain access to the evidence necessary to take action to open these essential channels of distribution. We therefore fully support this legislation. We think the protections on confidentiality are adequate, and I would be pleased to take any questions you may have.

Mrs. SCHROEDER. Thank you.

[The prepared statement of Mr. Goldfarb follows:]

CHRYSLER MOTORS

Lewis H. Goldfarb
Assistant General Counsel

August 4, 1994

Honorable Jack Brooks
Chairman, House Judiciary Committee
2449 Rayburn Building
Washington, D.C. 20515

Dear Chairman Brooks:

Chrysler Corporation is pleased to offer comments on S. 2297, the International Antitrust Assistance Act of 1994 (the Act). In essence, the Act would make it easier for our government to secure evidence of foreign antitrust conspiracies that harm U.S. consumers and businesses. It would authorize the Department of Justice and the Federal Trade Commission to enter into reciprocal agreements with their foreign counterparts to obtain evidence of antitrust activities that can only be found abroad. We believe the Bill would provide an essential tool for ensuring more even-handed enforcement of competition laws worldwide, and we fully support the proposed legislation.

This Committee is well aware of the obstacles faced by U.S. businesses in gaining access to and being able to compete freely in many major overseas markets. Numerous hearings have been held in recent years in both houses of Congress on legislative proposals designed to provide remedies for companies harmed by the anti-competitive conduct of foreign competitors. There is ample documentation in Committee archives from our industry and many others of the kinds of collusive practices by foreign producers that have prevented or seriously hampered U.S. exports overseas. We believe the Act could have a salutary impact on two fronts: (1) strengthening the enforceability of U.S. laws that prohibit the closing of foreign markets, and (2) inspiring a more activist posture on the part of foreign antitrust enforcers through cooperative enforcement projects with our antitrust agencies.

The one concern that naturally arises in any discussion of reciprocal access agreements is the fair treatment of confidential business data. U.S. businesses routinely furnish voluminous proprietary information to the government under a variety of regulatory statutes. This is not the case with most foreign governments which not only require very little data from the business community, but also have less of an arm's-length relationship with business than exists in our country.

S. 2297 has several provisions to safeguard against the improper accessing of such information. In addition to the exemptions for Hart-Scott-Rodino data, the Act would require that

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the Attorney General determine, for each agreement, that the recipient would provide comparable information to the United States and that it had in place confidentiality protections at least as stringent as those in the United States. These safeguards are essential to ensuring that U.S. business is not disadvantaged by the more comprehensive enforcement regime in this country.

We believe that S. 2297 effectively reconciles the requirements for effective international antitrust enforcement with the need to maintain proper controls over access to confidential business data, and we would be pleased to provide any further information that the Committee may need in considering this important legislation.

Very truly yours,

Lewis H. Goldfarb

Mrs. SCHROEDER. Well, I appreciate the panel very, very much. Let me now yield to the gentleman from New York for questions.

Mr. FISH. Thank you. This is a threshold issue that you must have thought about before you endorsed this legislation. In many foreign countries, there is a much closer identity between government and industry and labor and financial institutions than we have in the United States.

How can we be sure that such a government would take the independent, professional approach that you would expect of our Antitrust Division or the FTC? Couldn't these enforcement tools be misused in these countries to the detriment of U.S. companies operating overseas?

This question is addressed to the whole panel.

Mr. RILL. Well, Mr. Fish, let me lead off, if I may.

I think that is an excellent question. It certainly does grasp some of the reality of business and government relations overseas. There are several assurances that are contained in the legislation that address that issue.

First, the memorandum of understanding that is contemplated under the provisions of the bill require that the foreign antitrust laws be substantially similar to those of the United States, so that the foreign business-protection law masquerading as antitrust law would not, under the bill, be determined by a responsible Assistant Attorney General or Attorney General as being substantially similar to the laws of the United States.

Secondly, the public interest section of the bill, section 8(a)(3), requires the Attorney General in entering into the agreements to take into account the relationship between the foreign government and foreign business interests, so-called proprietary interest of the foreign government, in entering into an agreement, so that the concern that you raise is expressly addressed in the legislation.

The provision in the legislation is that it would be inappropriate for an information transfer to take place where there is a cause or concern that that information transfer will not be to the foreign antitrust agency, but that the foreign antitrust agency will serve as a conduit for foreign business corporations, competitor of the United States.

Finally, in entering into any information transfer, the safeguards of the bill fully apply so that the Attorney General or the FTC, as the case may be, would have to be sure that the confidentiality conditions overseas are the same as they are in the United States, such that the confidential information could not be transferred to a proprietary interest of the foreign State. That is really woven into the entire fabric of the bill, and I think that provides an adequate assurance to the legitimate question that you raise.

Mr. GOLDFARB. Let me just echo what Mr. Rill said, but also say that the opportunity to comment on any MOU is critically important. Once we became aware that our Government was about to enter into such an agreement, we, the industry, would certainly do our homework and make sure they had the benefit of all concerns that would exist with regard to the foreign government's relationship with its industry, as well as its confidentiality regime. So we feel pretty comfortable that this provision would be an adequate safeguard against the concern you expressed.

Mr. BLECHMAN. Congressman Fish, I think that the concern that you expressed is one that is of great concern to the U.S. Council, among others. It is not just that there may be official sharing, there may also be unofficial sharing between antitrust authorities and other governmental agencies that are more interested in industrial policy and otherwise helping their own companies compete with the United States.

The problem I have with what Jim Rill referred to in talking about the safeguards of this bill is that all of the safeguards rely exclusively on only one thing, and that is that the Justice Department and the FTC will adequately appraise the antitrust laws and the confidentiality capabilities of a foreign country.

Now, in the cases where they do that, and I am sure they will most of the time, there may be no problem. The problems will arise in those cases where the FTC and the Justice Department—because, for example, they are more interested in prosecuting cases and getting information from foreign countries than in protecting a particular company's trade secrets and perhaps because the party whose confidential information is at stake is not heard or doesn't have a role in the process—err on the side of being less scrupulous than perhaps the owner of the information would like making these decisions.

There will be difficult judgment calls that will require careful investigation. That is precisely why we think there has to be some check and balance, some opportunity for a business to say, "Wait a minute, before you share my trade secret with that country, you ought to know, for example, that this company is 50 percent owned by the government that is asking for the information, so please don't share it."

Our problem is that there is no opportunity for even a voice from that business to be heard—other than at the MOU comment stage, and even there the final determination is strictly the Justice Department's and the FTC's. There is no opportunity for a check or balance or for the business affected to make its voice heard.

Mr. FISH. Well, that leads me right into the question I had for you, which I propounded to Ms. Bingaman about the U.S. Council for International Business suggesting notice to the company concerned, a short time period in which to object, expedited judicial reviews, et cetera.

Her answer, as I understand it, would be that to disclose this information would blow the case. Would you care to respond to her testimony?

Mr. BLECHMAN. Yes. I think that there may be cases of criminal behavior, hardcore cartel criminal behavior, where the kind of secrecy in an investigation that you are referring to might be incrementally helpful to the Department. I think in most antitrust investigations, even criminal ones, you can build a case even without that. But the kind of situation where you would ever need to proceed without notice would be limited to that kind of a criminal hardcore cartel case.

But this bill isn't limited to that. This bill would cover civil investigations and it includes all kinds of behavior that go way beyond cartel activity. The American companies whose secrets are being

shared aren't necessarily being accused of violating foreign cartel laws or anything like a cartel law.

Therefore, I have two answers. One is that if it is a question of weighing a slight disadvantage in terms of law enforcement versus the right of a private party to protect its own property—here, trade secrets that may be worth hundreds of millions or billions of dollars—our legal system generally tends to tip against enforcement and in favor of protecting private rights, particularly those of innocent parties.

Second, if that is not acceptable and you want to preserve the opportunity secretly to pursue criminal defendants who are engaged in cartel behavior, then limit this aspect of the bill to cartel behavior. Where a party is being accused of price fixing, even if that is under a civil law of another country, limit it to that, but don't throw the baby out with the bathwater and allow willy-nilly for secret disclosure of U.S. trade secrets to foreign powers, where none of those things are really involved.

Mr. RILL. Could I comment on that question, Mr. Fish, or wait until another question is asked, but I think this is reasonably timely right now, if I may.

Mr. FISH. Please do.

Mr. RILL. If that is agreeable.

I would like to say I think there are two premises here that bear questionable weight under scrutiny. One is that the Attorney General or the FTC won't do its job. And I don't think there is any basis for that. I think that the experience of the Justice Department and the FTC in giving due weight to confidential information has been absolutely excellent under every administration that I have been familiar with.

I think that they certainly are going to take the confidentiality restrictions of this bill very seriously. They have certainly worked in that direction and made many compromises, so I don't think the notion that they are not going to do their job carries a lot of weight, particularly since they are going to have comments on the MOU's when they go forward.

Second, the premise is that only in criminal cases are expedition, speedy enforcement, and the maintenance of some confidentiality by the Government of its own enforcement plans and priorities and intentions important. That is not true. It is not true in my experience and I don't think it is true in anyone's experience that has ever sat in the AAG chair.

There can be very complex joint venture relationships in which there can be a need for customer contacts. You can have vertical arrangements where the need for expedition and some confidentiality are almost equally, virtually equally identical to those that exist in criminal situations.

So I don't think it bears up under scrutiny to say that this is an issue that applies only in a narrow criminal enforcement context.

Let me also say that we have in this bill, that has been molded and designed by both of you, notice and comment on a memorandum of understanding. We have determinations to be made each time information is to be turned over. We have exclusion of Hart-Scott material. We have every safeguard short of the ones suggested by Mr. Blechman, who is certainly an outstanding antitrust

lawyer, every safeguard short of the judicial review provision, in this legislation.

I think to have seriatim judicial review each time a piece of paper goes over is going to not only undermine the enforcement-intention confidentiality, the confidentiality of the enforcement agencies, but would also take a lot of time. And then at the end of the day, what do we have? We have a judge being called on in the abstract under an abuse of discretion standard to say, notwithstanding all these things the Attorney General looked at, she didn't do her job and, therefore, the court is going to bar the turnover.

Now maybe there is a judge somewhere that will do that, maybe in 1 case out of 100,000 there is a judge somewhere that will do that, but I bet you it won't happen very many times. And the damage that is done by litigators testing that issue perhaps for delay purposes, perhaps for disclosure purposes, I think would—I agree with Assistant Attorney General Bingaman—seriously undermine the objectives of the bill.

I am sorry to intrude on another question, but I wanted to have that in sequence from Mr. Blechman's answer.

Thank you, Mr. Fish, for your courtesy.

Mr. BLECHMAN. Mr. Fish, just another comment on that, if it would be useful.

Mr. FISH. Certainly, certainly. We are getting the issue ventilated, I think.

Mr. BLECHMAN. Jim made three points. One, he said the criticism or the suggestions we were making were based on the predicate that the Assistant Attorney General and the FTC wouldn't do their job.

Laws, in my view, can be predicated on the assumption that Government officials will do their job. Laws have to be predicated on the proposition that sometimes you have to control government action for those rare cases when an official doesn't do its job. That is why you have judicial review.

It is not an insult to all government officials to have some degree of judicial review. It is a safeguard for those cases when government officials don't do their job.

Mr. FISH. That is why we have hearings, isn't it, Mr. Chairman, so that experts can tell us generalists how they disagree?

Mr. Rill, you will remember that the ABA Antitrust Task Force recommended the bill be amended to ensure that immunized U.S. witnesses receive equivalent immunity from any foreign antitrust agency to whom their testimony is disclosed. I asked Ms. Bingaman if she would entertain an amendment to this regard, and her answer was a very unequivocal no.

Do you have any comment to make? You didn't touch on this in your——

Mr. RILL. I am sorry. I think the task force report correctly concludes that this is a concern that should be addressed. Ms. Bingaman is quite correct that constitutional protection of immunity runs to protection under the U.S. laws. Congress shall pass no law impairing the right against self-incrimination, for example.

Nonetheless, in executing agreements, it would be entirely appropriate for the United States to insist that the foreign authority honor immunized testimony that would be turned over. I also

agree—and this is the position of the task force—it is a sensible position.

I also agree with Ms. Bingaman that the fact of the matter is that it doesn't arise in very many cases. We have Canada where there is already an MLAT. So cooperative criminal enforcement, between the United States and Canada is also covered.

In Japan there have been two criminal cases since 1947 when the Anti-Monopoly Act was passed in Japan. I don't see Japan as a ferocious tiger in criminal law enforcement.

So as a practical matter, I can't quarrel with Assistant Attorney General Bingaman's statements, but I think that still it is a sensible suggestion that is made by the task force.

Mr. FISH. Thank you.

Mr. Rill, finally, does the bill prevent a foreign antitrust agency from obtaining, through the Attorney General's use of a civil investigative demand, information which is identical to that which is shielded from disclosure if it is already in the hands of the Department, such as a Hart-Scott-Rodino filing?

Mr. RILL. The legislation does permit the use of CID's to obtain information in support of foreign antitrust investigations, and if the CID were to cover the same information that is covered by a Hart-Scott-Rodino filing, presumably under appropriate circumstances with all the safeguards, it would be possible for the foreign government to obtain that information.

But now let's go back to, for a second, to Mr. Blechman's concern. We have not only there all the legislation's safeguards, but we have in that case by definition notice to the party who receives the CID and an opportunity to challenge that CID that is being promulgated by the United States on behalf of a foreign agency.

So there is an opportunity for judicial review there that there would not be if the foreign antitrust agency were simply able to reach into our Government files and pull out the HSR, which the bill, of course, prohibits.

Mr. FISH. Thank you very much.

Thank you, Mr. Chairman.

Mr. BROOKS [presiding]. Thank you, Mr. Fish.

Mr. Rill, your task force report suggests amending legislation in the future to permit the sharing of confidential Hart-Scott-Rodino premerger notification filing. What are the competing considerations to be reviewed in deciding whether or not to permit this Hart-Scott-Rodino information to be shared?

I want all of you to think about that, if there is some comment that you want to make that you haven't already made.

Mr. Rill.

Mr. RILL. Well, I think that certainly one of the historic approaches by the ABA in looking towards greater antitrust enforcement cooperation was in the area of merger activity. So there was an interest in perhaps sharing information related to mergers.

The consideration that militates against that is that Hart-Scott-Rodino information is particularly sensitive in many respects, dealing there with strategic plans, with competitive information, certainly with trade secrets, with really crown jewels of the company. I think a lot of business organizations were very concerned that the turnover of Hart-Scott-Rodino materials to a foreign government

would raise a particular danger because of the sensitivity of that information.

I think the legislation makes an appropriate compromise. If over time the bill works in nonmerger areas, then maybe it would be time to expand it. But I think limiting Hart-Scott now is an appropriate consideration. Besides, much of that information is obtainable in other ways.

Mr. GOLDFARB. We would be very concerned with any expansion of the coverage to include Hart-Scott-Rodino information. This is because of the enormous volume of information that is routinely furnished pursuant to Hart-Scott-Rodino and the great sensitivity of that information from proprietary standpoint.

I think Chrysler has had as many as 10 or 12 Hart-Scott-Rodino filings in the last year. Including Hart-Scott-Rodino documents would expand the scope of the documentation that would be available so significantly that we would really have to rethink our position on the issue.

Mr. BROOKS. Would you like to add anything to that, Mr. Blechman?

Mr. BLECHMAN. No. I think I agree with the other two members of the panel.

Mr. BROOKS. That is a little unusual for a lawyer, but still nice.

Mr. Rill, what would be the disadvantages of limiting cooperation under this legislation to investigating conduct that would constitute a violation of the antitrust laws of both the United States and the foreign nations involved?

Mr. RILL. Oh, I think it would very seriously limit the reciprocity that would be available to us under the legislation. I mean, the reason for this legislation is not to give documents to foreign countries.

The reason for this legislation is to improve the enforcement power of the U.S. agencies. They want to get the information to be more effective in going after foreign cartels that inhibit the foreign commerce of the United States.

To limit that opportunity to get the information by limiting what we will give is going to vitiate the effect of the bill. To require that foreign antitrust laws have exactly the same boundaries as our antitrust laws, I think, has that limiting effect, and I think we are adequately protected by having in the definition of an appropriate MOU, an MOU with a foreign country whose antitrust laws are substantially similar to those of the United States.

Mr. BROOKS. Mr. Blechman, any comments on that?

Mr. BLECHMAN. Just one.

I think that we should recognize that some of the information that will be going to foreign countries to enforce their antitrust laws is going to be in connection with their investigations of behavior that may even be regarded as procompetitive or normal in the United States.

The concept or the proposition that the United States has the broadest antitrust laws in the world, I think, is a debatable proposition. I think we may have the wisest, maybe the lines we draw are the best, but there are certainly foreign countries that have much broader and more encompassing antitrust concepts.

For example, in looking at the Croatian antitrust law, which I happened to do, I can tell you that if that Croatian antitrust law were to be enacted as it was originally proposed, it would be the broadest antitrust law in the world.

It covered, for example, the case where you have a few companies that have a total market share of, say, 30 percent. Those companies would be deemed to have a monopoly collectively, and if they abused that monopoly position by charging a higher price than the Croatian antitrust authority thought was fair, that would be a violation of Croatian antitrust law. That is a broader antitrust law than the United States has.

There are many countries that have antitrust laws that follow different ideas of economics than we do, and so one of the problems that you are going to have with this bill is you are going to be producing information for foreign investigations and prosecutions of behavior that we may think is neutral or even procompetitive.

Mr. RILL. But that is why we have a provision in the legislation that requires the foreign laws to be substantially similar to those of the United States, and I would be wondering what hallucinogenic drug an Attorney General might be on if he or she felt that the Croatian metaphor that Mr. Blechman just gave was substantially similar to anything that exists, thank God, today in the United States.

Mr. BLECHMAN. How about the EC? Its law also prohibits abuses of monopoly position.

Mr. BROOKS. Mr. Goldfarb, any comments on that?

Mr. GOLDFARB. I agree with what Mr. Rill said.

It is very unlikely our Government's going to enter into an agreement with Croatia or Sri Lanka or one of those countries where really there is not a lot of commerce, there is not likely to be the kind of antitrust activity in those countries that we are focused on today.

Mr. BROOKS. What additional confidentiality protections might be needed for reciprocal agreements with regional economic integration organizations, given that such regional organizations are not sovereigns in the traditional sense, and may well share information with all of their member nations, even those who are unwilling individually to contribute and to cooperate?

Mr. RILL. I think that is——

Mr. BROOKS. Big regionals.

Mr. RILL. No, I understand, Mr. Chairman. I think that is a good question and it raises a very legitimate concern. I know only that the bill requires that if information is to be shared with a regional agency, for example, the EU Commission, that agency has to give the assurance that it will keep the information confidential to the same extent that the DOJ and the FTC keep that information confidential in the United States.

If they can't do it, then the fact is that that information exchange isn't going to take place and an MOU probably isn't going to be executed. They have to give assurance that they can do it. If their statutes prevent them from doing it, then I think that this bill probably isn't going to be applicable.

That isn't to say that there wouldn't be some level of cooperation that could occur. That isn't to say that the Council of the EU hypothetically wouldn't amend the regulations to be able to give that assurance, but they would have to do that, and your question is well taken.

Mr. BROOKS. If they didn't meet the tests, they weren't in?

Mr. RILL. That is right.

Mr. BROOKS. If their rules said the members could operate on their own, it was a loose regional operation and some in, some out——

Mr. RILL. That is the way I interpret the bill.

Mr. BROOKS. Mr. Goldfarb.

Mr. GOLDFARB. I agree with that.

Mr. BLECHMAN. I guess, if the EC today wouldn't qualify because it would have to share the information, then I wonder why there is a provision in this bill at all for regional economic integration organizations.

What other ones would the bill apply to?

Mr. BROOKS. Asian, could be South American; any kind.

Mr. BLECHMAN. But I don't know if any of those have antitrust authorities. There is the ASEAN, the Association of Southeast Asian Nations, but I don't think they have an antitrust authority.

Mr. BROOKS. Then it wouldn't be applicable, would it?

Mr. BLECHMAN. Right, so I don't know why it is in the bill.

Mr. RILL. I hesitate to presume why it is in the bill, but it seems to me if the EU has a regulation provision that would not permit it to give the assurance that the bill requires, then it could amend that provision so that it could give that assurance and then the bill would be ready to receive it if it were able to do so.

I think that is a simple answer to why it is in the bill.

Mr. BROOKS. Only if you meet the specs.

Mr. RILL. That is right.

Mr. BLECHMAN. And right now, there is not a single organization in the world that does.

Mr. BROOKS. Well, we are not sure about that. I do want to ask one final question.

What it really boils down to is whether or not we are going to protect American business and American jobs from foreign cartels that exploit our markets and thereby our jobs and our opportunity and our profits and our businesses.

Is that a fair evaluation of what the——

Mr. RILL. I agree with you, Mr. Chairman. That is the reason we erased footnote 159 from the 1988 guidelines. That is the reason we support this bill. I think that is the reason why the Department of Justice and you and Mr. Fish are working for its enactment.

I appreciate it very much.

Mr. BROOKS. Mr. Goldfarb.

Mr. GOLDFARB. Yes, we definitely agree with that. As one of the largest exporters in the country, Chrysler wants to keep the jobs here and we want access to foreign markets to be able to send our goods over there. So it is critically important.

Mr. BLECHMAN. The U.S. Council supports that kind of enforcement also, Mr. Chairman. It is just that we believe that it can be

done with some additional safeguards to protect American trade secrets and thereby American jobs as well.

Mr. BROOKS. I want to thank all of the witnesses for their helpful and informative testimony. Again I would like to praise Ms. Bingaman and Attorney General Reno, for their initiative in this area.

If the benefits the U.S. economy has enjoyed under the protection of the antitrust laws are to endure, our competition statutes must be broadly applied in the world marketplace. The interconnected nature of world trade and economic patterns demand no less, particularly since I learned today from Ms. Bingaman's testimony that a quarter of our gross national product is internationally involved. It is now totally unacceptable for outlaw nations who want to fix prices and engage in cartel activity to think they can operate free and clear over here while denying access to documents in their home countries. So I am very supportive of H.R. 4781 as the essential first step in removing the practical obstacles to obtain the evidence from abroad.

But let's not deceive ourselves: More will need to be done. Next Congress, other foreign antitrust initiatives will be a top priority of mine. In the meantime, I hope we can enact this legislation to get the ball rolling. We will take a look at the suggestions made today and study the bill's provisions carefully. I hope to move the bill promptly to the floor.

The hearing is adjourned.

[Whereupon, at 4:14 p.m., the subcommittee adjourned.]

APPENDIXES

APPENDIX 1.—WITNESS RESPONSES TO ADDITIONAL QUESTIONS FOR THE HEARING RECORD

Questions for the Record

Submitted on behalf of the Republican Members

Subcommittee on Economic and Commercial Law

Questions for Anne K. Bingaman, Assistant Attorney General
For Antitrust, Department of Justice Concerning H.R. 4781,
The International Antitrust Enforcement Assistance Act of 1994

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(1) What will be the effect of this Act, if any, on the use of foreign sovereign immunity, whereunder companies have defended themselves in antitrust and other kinds of cases by claiming that their actions were directed or compelled by a foreign state?

Answer:

The Act is purely procedural in nature, and will neither expand nor contract substantive claims or defenses under the antitrust laws. As a formal matter, it does not address either the availability or unavailability of a foreign sovereign compulsion defense or the doctrine of foreign sovereign immunity. However, in practical terms, the Act will enhance the ability of the Justice Department and the Federal Trade Commission to get the evidence needed to determine whether there is a sound basis for a defense based upon a claim that a company's actions were directed or compelled by a foreign state, and in this way it will help to ensure that such claims are sustained only when the governing law so requires.

(2) Many American companies are multi-national or they have a widespread presence overseas. Is it your expectation that foreign governments will frequently come to the Justice Department and FTC seeking information to assist in enforcement actions against U.S. businesses? Do they frequently seek such assistance now?

Answer:

The United States has the strongest and best enforced antitrust law in the world. For that reason, it is our expectation that for the foreseeable future the U.S. enforcement agencies will be seeking assistance from foreign agencies far more often than the reverse situation. This would also be consistent with our experience at present. It has

not been common for foreign antitrust agencies to seek the U.S. antitrust agencies' assistance in prosecuting U.S. firms.

The cases in which foreign agencies have sought available assistance from the United States have typically involved conduct or transactions that are also of enforcement interest to one of the U.S. agencies.

(3) Do you anticipate that there will be one agreement with the European Community (EC) or will there be separate agreements with each of the member countries in the EC?

Answer:

We anticipate that agreements with both the European Union (EU) authorities and those of the individual member countries would be necessary in order to achieve the fullest access to European-located evidence. This reflects the division of authority within the EU itself. The Commission has exclusive authority to enforce certain laws of the European Union, but it shares authority to enforce other EU antitrust laws with the member countries, and all of the member countries also have their own antitrust laws. In any given case, the Commission, a member country authority, or both, might have evidence relevant to a U.S. investigation, or be in a position to obtain such evidence. Each individual agreement with a member country or the EU would be independently useful, and the U.S. agencies would be able to negotiate agreements on a country-by-country basis. Provisions in the bill assure that no agreement will be entered, whether at the EU or member country level, unless the confidentiality of information provided under the agreements by the U.S. agencies is adequately protected.

(4) Are you required under the terms of the bill to notify a U.S. company or companies when information is being requested about it by a foreign antitrust authority?

Answer:

U.S. companies will always have notice about the potential for the sharing of information under an antitrust mutual assistance agreement, because of the bill's detailed requirements for notice and publication of proposed agreements and amendments to agreements. Thus, even for information already in the possession of

one of the U.S. antitrust agencies, the party furnishing that information will have known about the possibility for sharing with countries that are parties to agreements at the time it responded to the civil investigative demand, administrative subpoena, or other request for information. Equally, U.S. companies will know that the information described in section 5 of the bill cannot be shared with foreign agencies. If the Justice Department or FTC were to seek information from a U.S. company for the purpose of assisting a foreign antitrust agency pursuant to sections 3 or 4 of the bill, the U.S. agency would clearly state at the outset that assistance to a named foreign agency was the purpose of the request.

(5) Could this bill expose U.S. firms to foreign antitrust liability for conduct which is acceptable or exempt under U.S. antitrust law? I have in mind unilateral vertical restrictions against exports by a distributor, which might be illegal under foreign law, or cooperative activities to facilitate exports under the Export Company Trading Act.

Answer:

From the point of view of substantive law, the bill does not expose U.S. firms to any new liability for conduct in foreign countries that might violate the law of a country in which they operate, nor does it change the liability of exporters in foreign countries to comply with the U.S. antitrust laws when they are selling into our market. From the inception of the Export Trading Company program, for example, both the Commerce and Justice Departments have made it clear to ETC applicants that while the Act exempts them from U.S. antitrust liability, it does not and cannot provide an exemption from their obligation to act in conformity with the law of the countries in which they do business.

The bill would permit one party to an agreement to give assistance, even if the conduct under investigation by the requesting party did not violate the law of the requested party. In the vast majority of cases, this will be beneficial to U.S. enforcement. The bill also requires the U.S. agencies to take into account the public interest of the United States prior to giving assistance in a particular case. In those rare cases when the conduct did not violate U.S. law, the Justice Department and FTC would consider on a case-by-case basis whether providing assistance in a foreign investigation of U.S. firms for conduct that would not violate U.S. antitrust law is consistent with U.S. public policy. For example, we would not expect to provide assistance if it appeared that a U.S. firm was an object of discrimination through a foreign antitrust enforcement action that would not be brought against similarly situated domestic firms.

The usefulness of the bill for U.S. antitrust enforcement would be seriously damaged if assistance were only permitted for conduct that violated the antitrust laws of both the requesting and requested countries. U.S. antitrust laws are the toughest and most vigorously enforced antitrust laws in the world, and ours is the world's biggest economy. It would not serve our enforcement interests to limit assistance under the bill to situations in which the foreign antitrust agency would act against the same conduct. We may well need assistance from countries that would not proceed against the conduct we are investigating, either because the conduct is not prohibited or because the effects are primarily or solely on U.S. consumers and businesses.

(6) Would it be possible for a foreign antitrust agency to obtain information indirectly under this act which it is forbidden to obtain under the exceptions to disclosure? What would the Attorney General do if she were asked to obtain, using a civil investigative demand, information equivalent to elements of a Hart-Scott-Rodino filing? Does the bill bar that?

Answer:

It would not be possible for a foreign antitrust authority to obtain privileged or classified information, either directly or indirectly. Similarly, the bill's requirement of a court order for the disclosure of grand jury information is absolute. Finally, the bill does not permit either the Attorney General or the FTC to treat information submitted pursuant to the Hart-Scott-Rodino Act as information "in the file" for purposes of Section 2.

In the case of Hart-Scott-Rodino information, the bill does not immunize from production every document or other piece of information that the Attorney General or the FTC may obtain from a firm in some other fashion, solely because the same evidence had also been provided to the U.S. agency in a Hart-Scott-Rodino filing. Public documents, information furnished in response to CIDs, and other information furnished through means other than a premerger notification filing or in response to a second request cannot be effectively immunized by also including them in a premerger filing or response to a second request. Furthermore, if the U.S. agency had not obtained the information for its own use under one of these other mechanisms, the only assistance available to a foreign agency would be measures pursuant to sections 3 or 4 of the bill.

In this connection, it is important to recall that the bill limits the assistance available to a foreign antitrust agency to assistance comparable in scope to what the foreign

authority would provide to us. No foreign antitrust authority or foreign government of which we are aware would use its powers to execute a U.S. request having the breadth and depth of a Hart-Scott-Rodino request, and thus none could expect such assistance in return.

(7) What provisions of the existing Antitrust Civil Process Act (15 U.S.C. §1313) are barriers to international antitrust investigations. Do you see a possible downside to changing the disclosure protections granted by that statute?

Answer:

Two provisions of the Antitrust Civil Process Act prevent its use to obtain information for a foreign antitrust investigation. First, the ACPA may be used only to investigate possible violations of the "antitrust laws", a term which is defined to include only the U.S. antitrust laws. Second, the ACPA limits the persons to whom evidence obtained under the Act may be disclosed, and that list does not authorize disclosure to a foreign antitrust authority. HR 4781 would remove these limitations by amending the ACPA to redefine "antitrust law" to include foreign antitrust laws, and to allow disclosure to a foreign antitrust agency to assist its investigation of a possible violation of its antitrust laws.

The power to use civil investigative demands for this purpose is a central way in which this legislation creates a valuable mechanism for mutual assistance in antitrust enforcement. We expect that it will play an essential role in our ability to offer the kind of effective assistance to foreign authorities that we want to receive in return. We believe that the strong confidentiality, public interest, notice and comment, and other protections incorporated in HR 4781 are fully adequate to address any risk of misuse or improper disclosure of CID materials. Given that nearly a fourth of the United States' GDP involves international trade, the real cost to U.S. consumers and businesses would come from a failure to change restrictions in existing law in the manner proposed in this bill so as to enable U.S. antitrust enforcement to be effective in this large, important, and growing sector of the economy.

(8) Why should foreign rules of procedure govern in United States courts under this act? What if a foreign nation has a definition of protected proprietary information which is far narrower than ours? What is wrong with applying the Federal rules in all instances?

Answer:

Section 4 of the Act would permit a U.S. court, upon the application of the Attorney General, to order the taking of evidence for use in a foreign antitrust investigation. The proceeding would be governed by U.S. law, but the procedural details could be adapted, to the extent consistent with U.S. law, to conform to the evidentiary requirements of the foreign investigation or proceeding for which the evidence is intended.

This provision is fully consistent with existing U.S. law. It is identical to that currently found in 28 U.S.C. 1782, the foreign judicial assistance provision of general applicability that has been in effect for many years. The bill, like section 1782, expressly preserves all applicable rights and privileges of the subject of a request, so that no U.S. firm or individual would be required to produce material that was privileged under U.S. law, and, to the extent that U.S. courts recognize it, privileged under foreign law.

The reason for permitting this procedural flexibility is to assure as far as possible that evidence is taken in a way that permits its use in the foreign antitrust investigation or proceeding for which it is sought. For example, under U.S. discovery rules discovery may proceed with little or no examination by a court of individual discovery requests. Under the law of some countries, however, testimony may be compelled only after a judge or magistrate has determined that there is a factual basis to warrant the examination. Moreover, in some countries only a judicial officer is allowed to ask questions of a witness. The procedural flexibility provided in section 4 would permit the court to use procedures of this kind, which are fully consistent with basic requirements of due process, to create an appropriate record that could then be presented in the foreign proceeding.

Finally, knowing that this bill is likely to be an influential model for foreign countries considering analogous legislation, we want to encourage other countries to provide the same type of flexibility on a reciprocal basis. This would permit us to take antitrust evidence abroad in conformity with U.S. procedures, even if they differed from the foreign country's rules. This kind of procedural flexibility might allow, for example, cross-examination of a witness by his own counsel in a country in which the examining judge normally conducts all witness questioning. If we ruled out this kind of flexibility under section 4 of the bill, it is reasonable to expect that foreign

countries would respond with reciprocal limitations on the kind of assistance they would provide.

(9) It seems to me that over a given period of time, say three to five years, the parties to an antitrust mutual assistance agreement will have to have made roughly equivalent use of its provisions for them to be satisfied that it is worth continuing the judicial and political burden of complying with each other's demands. Otherwise they may withdraw. Do you agree?

Answer:

Under an antitrust mutual assistance agreement, either party would have the right to withdraw after an initial period and upon reasonable notice, if it concluded for any reason that maintaining the agreement was no longer in its interest. It is possible that the United States or the other party to an agreement might conclude at some point that the burden imposed upon it outweighed the benefit it received under the agreement.

As a general matter, however, the United States' antitrust agencies are heavier consumers of foreign-located evidence than any foreign antitrust agency. A number of factors will enter into our evaluation of the usefulness of the agreements, including not only the number of requests made over a representative period of time, but also the importance of the cases in which we received assistance, the benefit to U.S. antitrust enforcement from the agreement, and other similar considerations. It is possible that a particular agreement might be used only on rare occasions, but to very important effect.

Finally, the bill requires a report to Congress three years after enactment describing the U.S. antitrust agencies' experience to date, including the approximate number of requests made to and received from foreign antitrust agencies. Thus, Congress will have the opportunity to be informed about progress in implementing the Act and, if there are questions, to address them to the U.S. agencies.

(10) What is the way to terminate an agreement, other than by breech of confidentiality?

Answer:

As is standard practice with such agreements, all antitrust mutual assistance agreements will include a provision permitting either party to terminate the agreement at any time, for whatever reason it chooses, subject to reasonable notice to the other party.

(11) The NAM argues that this bill should expressly provide that foreign antitrust laws sought to be enforced under these agreements should be consistent with U.S. antitrust laws. Assume that as a consequence of a merger or acquisition that some manufacturing facilities are closed down. Could foreign laws prohibiting or inhibiting plant closings be enforced through the back door under this Act, to the detriment of economic efficiencies that would be viewed as pro-competitive under U.S. law?

Answer:

The bill allows assistance for investigations under foreign antitrust laws that are substantially similar to the U.S. antitrust laws, and that prohibit conduct similar to that prohibited by the U.S. antitrust laws. A foreign law, however labelled, such as the one in this question would not qualify for treatment under an antitrust mutual assistance agreement. Furthermore, a foreign government that has laws prohibiting or inhibiting plant closing could apply those laws directly, and would have no need to use its antitrust laws to achieve the same result indirectly.

Should it appear that a foreign antitrust investigation for which assistance was requested was not a bona fide antitrust enforcement action, but was instead a subterfuge for some other objective, the Attorney General or the Commission would be free to refuse assistance on the ground that it would be inconsistent with the public interest of the United States.

(12) Sec. 12(7) of the bill defines foreign antitrust laws as those that are substantially similar to any of the Federal antitrust laws and that prohibit conduct similar to conduct prohibited under the Federal antitrust laws. What role will the Attorney General have in determining whether a particular provision of foreign law under which an investigation is proposed in this country is in fact a valid antitrust law for such purposes? What if there is disagreement on this point?

Answer:

First, the Attorney General and the Commission together have considerable expertise with the antitrust laws of foreign countries, which they will bring to bear from the moment negotiations for an antitrust mutual assistance agreement begin. The agreements themselves will identify the laws that are covered, and interested parties will have an opportunity pursuant to the bill's notice and comment provisions to bring to the U.S. agencies' attention any laws which they believe are not "antitrust laws" as defined by the bill, before the agreement goes into effect.

Once an agreement is in place, in every instance in which a request for assistance is received from a foreign antitrust authority, the Attorney General or the Commission, as the case may be, will have to determine that the foreign law involved is an antitrust law within the meaning of the Act. If the Attorney General or the Commission were to conclude that the relevant provision of the foreign law is not an antitrust law, assistance would not be provided.

If a requesting foreign antitrust authority disagrees with the Attorney General's or Commission's conclusion that the relevant foreign law is not an antitrust law, the U.S. authorities would be prepared to consult with the foreign agency to assure that their determination did not result from misunderstanding or incomplete understanding of the foreign law. Ultimately, however, it will be up to the requested U.S. agency to decide whether to provide assistance.

(13) Before any antitrust mutual assistance agreement can be signed and implemented, of course, there must be legislative action by the foreign nation concerned, and that must provide access similar or identical to what we would provide. We are dealing with many different foreign legislative bodies. What if certain of them provide a narrower range of access to materials than we do under this act? Do we narrow by agreement what would be accessible under the act? What obstacles do you foresee in this process, and what time frames might be involved?

Answer:

Under Section 12 (2) of the Act, each antitrust mutual assistance agreement must include assurance that the foreign antitrust authority involved will provide assistance to the United States antitrust agencies that is comparable in scope to the assistance that would be provided by the U.S. agencies. If a particular foreign antitrust authority undertakes to provide only limited assistance to the U.S. agencies, either because of limitations in the foreign authority's legislation or for other reasons, the United States' agencies' obligations under that agreement would be correspondingly limited.

It is not possible to predict how many countries will enact legislation to enable them to enter into the kind of agreement permitted by the Act, or how soon they will do so. We do know that the proposed legislation has attracted considerable favorable attention abroad; and we are aware that the 1988 and 1990 legislation authorizing the SEC to enter into cooperation agreements for securities law enforcement triggered the enactment of similar laws in a number of other countries. There is every reason to anticipate that a significant number of foreign governments will wish to enter into agreements of this kind, and will seek appropriate legislation, in the antitrust area. The sooner this authority and the agreements it permits are in place, the sooner we will be able to bring these new and powerful investigative tools to bear on the large number of international antitrust investigations now pending and likely to arise.

Questions for the Record

Submitted on behalf of the Republican Members

Subcommittee on Economic and Commercial Law

Questions for Michael D. Blechman, Chairman, Competition Committee, U.S. Council for International Business

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(1) Some have raised the concern that the cooperative activities encouraged by the Export Trading Company Act could be undermined by this legislation. This is, some countries may try to use their competition laws to discourage those cooperative activities by U.S. companies that are aimed at increasing U.S. exports. Could you comment on these concerns?

The Export Trading Company Act of 1982 creates a procedure by which any person engaged in export trade may obtain limited immunity from prosecution under United States antitrust laws by requesting a Certificate of Review from the Secretary of Commerce. 15 U.S.C. § 4001-4021. The Secretary of Commerce may issue a Certificate of Review only if the Attorney General first agrees that the applicant has established that its export trade, export trade activities and methods of operation meet the statutory eligibility standards for antitrust immunity under the Act. See 15 U.S.C. § 4013(b). Once the Certificate of Review is granted, the holder of the Certificate is protected against criminal and treble damage liability under the antitrust laws for all conduct specified in the Certificate that occurred while the Certificate is in effect.

The International Antitrust Enforcement Assistance ("IAEA") Act of 1994, in its present form, would create an incongruity by authorizing the Attorney General to assist in a

foreign government's investigation and prosecution of foreign antitrust laws based on conduct that the Attorney General and the Secretary of Commerce have already specifically approved in a Certificate of Review issued under the Export Trading Company Act.

(2) Section 3(a) states: "(S)uch investigations may be conducted ... without regard to whether the conducted investigation violates any of the Federal antitrust laws." So, Justice and the FTC will be in the position of assisting foreign governments in the enforcement of their laws, which may subject U.S. companies to liability for behavior that is lawful under U.S. law. Is that a good policy result? Should the U.S. agencies have the discretion to not assist foreign governments in those instances?

This question highlights a basic problem with the IAEA Act as currently proposed. It is beyond dispute that the IAEA Act would authorize the Attorney General to assist foreign antitrust authorities in the investigation and prosecution of foreign antitrust laws based on conduct that is viewed as neutral or even pro-competitive under United States law. For example, the European Community recognizes a much broader definition of monopolization than the United States. Under Article 86 of the Treaty of Rome, an abuse of a dominant market position is defined to include "unfair purchase or selling prices or other unfair trading conditions" without regard to whether the dominant position has been obtained through legitimate competition. Other countries' present or proposed antitrust laws make it illegal for a company to charge "unfair" prices when it is merely an oligopolist, i.e., one of several unrelated companies which

together allegedly possess market power. In contrast, under United States antitrust laws the offense of monopolization requires both "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). So long as a company is not a monopolist, or has gained its market position through legitimate competitions, U.S. antitrust law does not seek to regulate its prices. Indeed, the economic philosophy underlying U.S. antitrust law would be opposed to any such substitution of government regulation for market forces as a means for controlling prices.

Monopolization law is but one example. There are many areas in which foreign "antitrust" laws are at odds with the goals and methods of our own competition statutes. Thus, the proposed legislation would authorize the Attorney General to disclose a company's trade secrets and other confidential and proprietary information to a foreign government, without notice to the company or an opportunity to be heard, in instances where the company has acted in conformance with both United States law and the policies underlying those laws.

As Assistant Attorney General Bingaman indicated in her testimony before this sub-committee, the justification for the proposed legislation not providing any notice to a company whose trade secrets will be disclosed to a foreign government is that

such notice would undermine the investigation of hard-core, criminal cartel behavior, i.e., covert price-fixing and market allocation agreements. However, the legislation is not limited to such behavior, and confidential information can therefore be shared with foreign governments even when the companies whose trade secrets are disclosed are not even suspected of anything remotely resembling a cartel. Accordingly, either the legislation should be amended to require notice before confidential information is shared with foreign governments or, if such a notice provision is deemed to undermine the investigation of criminal, hard-core cartel behavior, then, at the least, the legislation should be limited so that such notice can be dispensed with only when a U.S. court has determined that there is probable cause to believe the company in question has in fact engaged in cartel behavior.

(3) Section 12 (2)(F) of the bill provides for the termination of an agreement if the confidentiality requirements are violated. But aren't there other reasons why termination may be justified? What if the other country fails to fulfill other terms of the Memorandum of Understanding (MOU) or the foreign government simply fails to perform in a more general sense under the agreement? Shouldn't the United States be able to terminate after reasonable notice in such circumstances?

Section 12(F) of the bill does <u>not</u> in fact provide for the termination of an MOU when its confidentiality requirements are violated. Rather, that section merely provides that the Attorney General or the FTC shall have <u>discretion</u> to terminate an agreement if its confidentiality requirements are violated <u>and</u> if the foreign government then refuses to agree not to violate those

provisions again in the future. At the least, automatic termination of an agreement for a violation of its confidentiality provisions would seem appropriate. In addition, termination would appear to be appropriate if any other substantive provision of an agreement is violated, even if it does not involve the confidentiality requirement.

(4) Does this legislation contain language that adequately protects the trade secrets of American companies?

No. The proposed legislation in its current form does not contain adequate protection for trade secrets of American companies because it provides no notice to the company before its trade secrets or other confidential and proprietary information is released to a foreign antitrust authority, and it provides no recourse or remedy for innocent companies whose trade secrets and other confidential and proprietary information are released wrongfully. We have accordingly proposed an amendment to the bill that would ameliorate this problem while addressing the Department of Justice's concern that extensive judicial proceedings not unduly delay its efforts to cooperate with a foreign antitrust authority.

(5) Your organization has stated that, under the Treaty of Rome, information that is provided to the European Community must be disclosed to all member states. To the best of your knowledge, are there no exceptions which might be applicable to evidence provided to the EC pursuant to an antitrust mutual assistance agreement entered into between the Attorney General and the EC antitrust authority?

The European Community has provided for the confidential submission of information. For example, at various

stages of an investigation conducted by EC antitrust authorities, information may be maintained confidential and not disclosed to all members states. This is the case, for example, where a settlement is reached with antitrust authorities before the full commission is notified of the investigation. However, we are unaware of any existing exception that would allow for information to remain confidential and not be disclosed to member states merely because the information was obtained pursuant to an antitrust mutual assistance agreement between the Attorney General of the United States and the EC antitrust authority.

Response of Lewis H. Goldfarb, Assistant General Counsel
Chrysler Motors Corporation
to Questions for the Record Submitted on Behalf of the Republican Members of
the Subcommittee on Economic and Commercial Law with Respect
to H.R. 4781, "International Antitrust Enforcement Assistance Act of 1994"

1. **Some have raised the concern that the cooperative activities encouraged by the Export Trading Company Act could be undermined by this legislation. This is, some countries may try to use their competition laws to discourage those cooperative activities by U.S. companies that are aimed at increasing U.S. exports. Could you comment on these concerns?**

   We have no reason to believe that the legislation would encourage some countries to try to use their competition laws to discourage the cooperative activities by U.S. companies pursuant to the Export Trading Company Act. It would seem that if any countries were so inclined to do this they would do it even in the absence of the proposed legislation.

2. **Section 3(a) states: "(S)uch investigations may be conducted . . . without regard to whether the conducted investigation violates any of the Federal antitrust laws." So, Justice and the FTC will be in the position of assisting foreign governments in the enforcement of their laws, which may subject U.S. companies to liability for behavior that is lawful under U.S. law. Is that a good policy result? Should the U.S. agencies have the discretion to not assist foreign governments in those instances?**

   We would not want to see the Department of Justice or the FTC assisting foreign governments in proceeding against conduct that is legal under U.S. antitrust law. U.S. agencies should have the discretion not to assist foreign governments in those instances.

3. **Section 12 (2)(F) of the bill provides for the termination of an agreement if the confidentiality requirements are violated. But aren't there other reasons why termination may be justified? What if the other country fails to fulfill other terms of the Memorandum of Understanding (MOU) or the foreign government simply fails to perform in a more general sense under the agreement? Shouldn't the United States be able to terminate after reasonable notice in such circumstances?**

   We believe that the United States could terminate an agreement with another country if any of the terms of the Memorandum of Understanding were violated by that country, notwithstanding that there is no specific reference in the proposed legislation. Failure to fulfill the terms of any agreement should give the other party the right to terminate that agreement.

4. **Does this legislation contain language that adequately protects the trade secrets of American companies?**

   We believe that the legislation adequately protects the trade secrets of American companies.

Response of James F. Rill (former AAG for Antitrust)
Collier, Shannon, Rill & Scott
to Questions for the Record Submitted on Behalf of the Republican Members of the Subcommittee on Economic and Commercial Law with Respect to H.R. 4781, "International Antitrust Enforcement Assistance Act of 1994" ("IAEAA")

1. **Some have raised the concern that the cooperative activities encouraged by the Export Trading Company Act could be undermined by this legislation. This is, some countries may try to use their competition laws to discourage those cooperative activities by U.S. companies that are aimed at increasing U.S. exports. Could you comment on these concerns?**

   There is nothing new in the proposed legislation that undercuts either the Export Trading Company Act or the Webb-Pomerine Act. Neither legislation provides immunity from foreign competition laws; nor was intended by Congress to sanction anticompetitive behavior in foreign markets. Instead, both laws were enacted to level the playing field, by allowing U.S. companies to compete more effectively against foreign cartels. For example, the EC exercised its jurisdiction to police conduct by the export association in the Wood Pulp case. If competition enforcement in foreign countries is increased as a result of the IAEAA, cooperative conduct by both U.S. and foreign competitors in a given market will be under closer scrutiny. As a result, the foreign cartels giving rise to, as well as, the cooperative activities sanctioned by these statutes will be reviewed by foreign enforcement agencies with greater scrutiny, facilitating a greater degree of unencumbered competition driven by market forces.

2. **Section 3(a) states: "(S)uch investigations may be conducted . . . without regard to whether the conducted investigation violates any of the Federal antitrust laws." So, Justice and the FTC will be in the position of assisting foreign governments in the enforcement of their laws, which may subject U.S. companies to liability for behavior that is lawful under U.S. law. Is that a good policy result? Should the U.S. agencies have the discretion to not assist foreign governments in those instances?**

   Although Section 3(a) expressly permits the exchange of information "without regard to the conduct investigated violates any of the Federal antitrust laws," the language of Section 8(a)(3) conditions the provision of information by the U.S. enforcement agencies to their foreign counterparts among other things upon whether providing the requested information is "consistent with the public interest of the U.S."

I believe that the legislation, as drafted, adequately protects U.S. interest, while promoting the notion of positive comity. The notion of positive comity is long overdue in the international antitrust arena. If the U.S. does not assist other countries in the enforcement of their respective competition laws, how can the U.S. expect the assistance of foreign countries in the enforcement of U.S. antitrust laws. Moreover, the successful SEC model, upon which the IAEAA is fashioned, has instilled the notion of positive comity in the SEC arena by properly conditioning U.S. assistance on foreign assistance; and not upon whether the conduct being investigated would violate U.S. law.

3. **Section 12 (2)(F) of the bill provides for the termination of an agreement if the confidentiality requirements are violated. But aren't there other reasons why termination may be justified? What if the other country fails to fulfill other terms of the Memorandum of Understanding (MOU) or the foreign government simply fails to perform in a more general sense under the agreement? Shouldn't the United States be able to terminate after reasonable notice in such circumstances?**

The language of Section 8(a) provides in pertinent part:

> . . . the Attorney General or the Commission may provide antitrust evidence to a foreign antitrust authority . . . only if . . . (1) the foreign antitrust authority - (A) will satisfy the assurances, terms, and conditions required by subparagraph (A), (B), and (D) of Section 12(2) . . . (emphasis added).

Section 12(A) provides:

> An assurance that the foreign antitrust authority will provide to the Attorney General or Commission assistance that is comparable in scope . . .

When read together, Sections 8(a) and 12(A) condition information exchanges on behalf of U.S. government officials upon their receipt of comparable assistance. If, for example, a foreign country were unwilling to assist U.S. enforcement efforts, under these sections, U.S. officials would be prohibited from providing those foreign officials with assistance. This prohibition, in effect, would constitute at least a temporary, de facto termination of mutual assistance efforts with that country.

4. **Does this legislation contain language that adequately protects the trade secrets of American companies?**

The IAEAA, as presently drafted, does not expressly address the prohibition against disclosure of trade secrets pursuant to 18 U.S.C. § 1905, which prohibits the disclosure of "trade secrets, processes, operations, style of work, or apparatus or the identity of confidential statistical data, a minor source of income, profits, or expenditures . . . Unlike its treatment of the other statutory provisions affording confidentiality, the IAEAA neither modifies the language of this statute nor exempts the disclosure of trade secrets from the disclosure requirements under the IAEAA.

The IAEAA, however, expressly conditions the exchange of information, among other criteria, upon "[a]n assurance that the foreign antitrust authority . . . will give protection to [the information/documents, etc.] received under such section that is not less than the protection provided under the laws of the United States to such antitrust evidence." (Section 12(2)(B)). This language would include the prohibitions under 18 U.S.C. § 1905, and therefore, would require the foreign agency to give trade secrets the same confidential treatment that is required by its U.S. counterpart.

5. **You are aware of the concern of many business groups over the absence of any judicial review or even notice to the affected companies before evidence in the possession of the FTC or the Department of Justice could be turned over to a foreign antitrust enforcement agency under the provisions of this bill. You are no less aware, from your years as Assistant Attorney General, of the need for expedition in antitrust cases. Could you balance these considerations for us, and describe what you would feel might be an acceptable compromise?**

The bilateral agreements, to date, have not realized their full potential to promote effective cooperative enforcement because they allow for the preservation of statutory and procedural safeguards that prohibit information sharing. The IAEAA, however, attempts to facilitate the exchange of information among foreign enforcement agencies in a manner that still respects and protects the confidential nature of the information being exchanged. Efficient and effective enforcement efforts must be balanced with notice and judicial review. I believe that the IAEAA, as proposed, does a good job in balancing these concerns by requiring judicial review for disclosure to foreign enforcement officials by extending the confidentiality protection of Federal Rule Criminal Procedure, 6(e) to judicial or administrative proceedings of a foreign state to Section 5 (2) of the IAEAA.

I believe that if the language of the draft IAEAA were modified to require notice of disclosure, this requirement could impede and/or delay criminal as well s civil enforcement efforts as well as create opportunities for frivolous civil litigation.

APPENDIX 2.—MATERIAL SUBMITTED FOR THE HEARING RECORD

COMMITTEE TO SUPPORT THE ANTITRUST LAWS
317 Massachusetts Avenue, N.E.
Suite 300
Washington, DC 20002

Phone (202) 789-3962

Facsimile: (202) 789-1813

August 8, 1994

The Honorable Jack Brooks
Chairman
Subcommittee on Economic and Commercial Law
B-353 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Brooks:

The Committee to Support the Antitrust Laws ("COSAL"), strongly supports the International Antitrust Enforcement Act, H.R. 4718.

There are several reasons why this legislation is extremely important. First, as a fundamental philosophical matter, complex and sophisticated international anti-competitive arrangements have proliferated in the past three decades. One only needs to review modern industrial history to see several striking examples in the computer, ocean shipping, airlines, uranium, and insurance industries, just to name a few.

These examples frequently involve powerful international corporations with the political muscle to influence the activity of governments. A strong international recognition of the dangers of anti-competitive arrangements is essential to ensure that strong multinational corporations do not play nations off against one another in a "race to the bottom".

For years, many of our trading partners seemed less inclined that the United States to recognize the dangers of anti-competitive agreements. Some nations passed so-called "blocking" and "clawback" statutes that, far from promoting international antitrust enforcement, seemed to inhibit it.

Recent years have witnessed tremendous progress in the recognition of the importance of competition principles, particularly within the European community. S. 2297 would foster the growing spirit of cooperation.

More specifically, because commercial relations cross international borders as easily as they formerly crossed state lines, a strong international web of cooperation among enforcement agencies to enforce the law against any anti-competitive conduct is now absolutely essential. Many of our trading partners have been reluctant to exchange information with U.S. antitrust enforcement authorities. S. 2297 would clear the way for important information sharing agreements.

We hope that your Committee report on this legislation would recognize the values of the information sharing in the antitrust context in general. Specifically, we believe that the Congress -- through your report -- should encourage the Antitrust Division and the Federal Trade Commission to share information not only with foreign governments, but with the Attorneys General of the various states as well as with private attorneys general, both of whom shoulder a tremendous responsibility within the antitrust laws. It would be ironic, indeed, if the Department of Justice and the Federal Trade Commission were willing to share information with foreign powers that they were not willing to share to the fullest extent permitted by law with the Attorneys General of the States of the United States as well as private litigants.

During the Reagan and Bush years, there was a marked decline in the willingness of the United States antitrust authorities to share information. We believe that this was an unfortunate trend. We believe that S. 2997 provides a significant opportunity for Congressional reversal of that trend.

Please do not hesitate to contact me with any questions.

With best regards.

Sincerely,

Jonathan W. Cuneo

cc: Honorable Anne K. Bingaman
Jonathan Yarowsky, Esquire
George Slover, Esquire

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
SENIOR VICE PRESIDENT,
MEMBERSHIP POLICY GROUP

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

August 8, 1994

The Honorable Jack Brooks
Chairman
Committee on the Judiciary
U.S. House of Representatives
2449 Rayburn House Office Building
Washington, DC 20515-4309

Re: International Antitrust Enforcement Assistance Act of 1994, H.R. 4781

Dear Mr. Chairman:

I am writing regarding H.R. 4781, the International Antitrust Enforcement Assistance Act of 1994, a bill that is moving on a very fast track toward floor consideration during the current session of Congress. While the U.S. Chamber of Commerce recognizes the need for effective law enforcement and applauds the underlying goal of this legislation, we have a number of concerns about H.R. 4781 and its competitive implications for U.S. companies trading abroad. Moreover, we believe that certain provisions in the bill require reconsideration, clarification, or modification before the House rushes to pass the legislation.

Accordingly, the Chamber urges the House Judiciary Committee to give further consideration to H.R. 4781 and to defer reporting the bill out of committee until the issues discussed in the attached comments have been fully addressed.

The Chamber is the world's largest federation of businesses and associations and is a principal spokesperson for the American business community. It represents more than 215,000 businesses, 3,000 local and state chambers of commerce, 1,200 trade and professional associations, 69 American Chambers of Commerce abroad, and 11 bilateral international business councils. While the majority of the Chamber's members are small business firms with fewer than 100 employees, many of the nation's largest companies are also active members. Moreover, each major classification of American business -- manufacturing, retailing, services, construction, extraction, wholesaling, and finance -- is represented in the Chamber's membership. Our comments on H.R. 4781 are the product of the views and opinions of our entire membership and, more specifically, the Chamber's Antitrust Council.

The thrust of the International Antitrust Enforcement Assistance Act is to permit foreign governments, acting through U.S. government agencies, to employ U.S. governmental discovery tools to conduct investigations under foreign antitrust laws. In the Act, assistance to a foreign government is premised upon that same government providing reciprocal discovery rights to U.S. antitrust agencies under "antitrust mutual assistance agreements" to be negotiated in the future.

The Chamber supports vigorous, evenhanded antitrust enforcement in the United States and abroad. No company that trades in the United States should be permitted to escape U.S. antitrust liability simply by maintaining its business records in a foreign jurisdiction. While H.R. 4781 certainly reflects a serious effort to address the problem of extra-territorial antitrust discovery, the potential adverse implications of this legislation are far-reaching and merit careful consideration.

The Chamber believes that H.R. 4781 can achieve the goal of international cooperation in antitrust enforcement and still adequately address the business community's competitive concerns if the bill is modified and revised. It is critical that more time be taken to consider the full implications of giving foreign governments such broad discovery powers under U.S. law.

The Chamber looks forward to working with you and your colleagues to fashion a bill that will truly serve the public interest in improved antitrust enforcement.

Sincerely,

R. Bruce Josten

Attachment

cc: Cynthia W. Meadow, Majority Counsel, Economic and Commercial Law Subcommittee
Alan F. Coffey, Jr., Minority Counsel, House Judiciary Committee
Charles E. Kern II, Minority Counsel, Economic and Commercial Law Subcommittee

Comments of the U.S. Chamber of Commerce on H.R. 4781, the International Antitrust Enforcement Assistance Act of 1994

- One issue to which considerably more thought should be given is the prospect that H.R. 4781 may expose U.S companies to foreign antitrust liability for conduct which is either perfectly acceptable under U.S. antitrust laws or exempt from such laws. An example of the first is the danger that unilateral vertical restrictions placed by manufacturers upon exports by distributors, which are generally lawful under U.S. law, could be investigated and challenged by foreign governments whose laws apply a very different standard of conduct. An example of exempt conduct which could be jeopardized by this bill is cooperative activities to facilitate exports which are immunized by the Export Trading Company and Webb-Pomerene Acts. Such exempt activities have been a major issue of international trade matters and have come under attack in foreign antitrust proceedings. The proposed legislation will facilitate investigations of these legislatively sanctioned trade groups. Because of the added antitrust risks H.R. 4781 will create for these groups, the proposed legislation may amount to a de facto repeal of these two important export promotion statutes or, at a minimum, seriously reduce their value to U.S. companies.

- A second important concern is the potential liability for persons testifying in U.S. antitrust proceedings under grants of immunity. A person can be compelled to testify, over his or her Fifth Amendment rights, if furnished an appropriate grant of immunity. Such immunities are used extensively by the Antitrust Division, to the point that the vast majority of witnesses testifying in U.S. antitrust grand jury proceedings are immunized. The proposed legislation would permit foreign governments to gain access to such testimony, although they are under no obligation to respect immunities conferred by U.S. government agencies.

Other potential problems with this legislation as drafted:

- Section 4(b)(2) of the Act authorizes a U.S. court to compel the production of documents or testimony under the procedures of the requesting foreign government. This provision places U.S. courts in the position of interpreting and enforcing foreign procedural law and could deprive U.S. companies of important legal protections. All civil discovery under this legislation should be subject to the Federal Rules of Civil Procedure.

- Section 5(1) of the Act purports to exempt Hart-Scott-Rodino premerger notification and second request materials from the statute. The Chamber is concerned about the broad-scale exchange of confidential business information and we believe that it is, indeed, critical that such materials be excluded. Nevertheless, the bill's language leaves open the distinct possibility that companies will be compelled to provide such materials to foreign governments under other provisions of the Act. For example, there is nothing to prevent the agencies from issuing a civil investigative demand that includes a request

for all materials submitted to the U.S. government under Hart-Scott-Rodino. Alternatively, the agencies might issue demands merely replicating the specifications of a Hart-Scott-Rodino filing or second request. The statute should make it absolutely clear that the government agencies may not do indirectly what they are prohibited from doing directly; if not, the purpose of the section -- to protect the confidentiality of submissions under the Hart-Scott-Rodino Act -- could readily be defeated.

- Section 9 of the Act would eliminate the possibility of judicial review with respect to significant portions of the statute. This legislation is designed to abbreviate the process for entering mutual law enforcement agreements. It does so in a manner that involves only minimal public notice and comment. Given the considerable powers that the Act confers, the Chamber believes that the possibility of judicial review should be preserved.

- The Antitrust Civil Process Act (15 U.S.C. § 1313) and the FTC Act (15 U.S.C. § 57b-2) strictly limit the disclosure of confidential information which has been produced by private parties to the Department of Justice and the FTC. Under those statutes, disclosure may not be made to any third party without the consent of the furnishing party. The only exception is Congress, or one of its committees or subcommittees, to which the information may be disclosed provided that notice is given to the provider of the information. Under the proposed Act, such information could be disclosed to any foreign agency with antitrust laws "similar" to ours, provided only that it has given an "assurance" of confidentiality. The disclosing party would receive no notice of such disclosure and would have no opportunity for judicial review. We are greatly concerned that despite assurances of confidentiality that may have been given, such information may quickly become public knowledge. At the very least, the parties whose information is proposed to be disclosed should be notified of such proposed disclosure and given an opportunity to object to it.

STATEMENT OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS

On The
INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT OF 1994

Before the
SUBCOMMITTEE ON ECONOMIC AND COMMERCIAL LAW
COMMITTEE ON THE JUDICIARY

AUGUST 8, 1994

Mr. Chairman, members of the subcommittee, the National Association of Manufacturers (NAM) is pleased to be able to offer its views regarding H.R. 4781, the International Antitrust Enforcement Assistance Act of 1994.

The NAM is a voluntary business association of more than 12,000 companies, large and small, located in every state. Members range in size from the very large to more than 8,000 smaller manufacturing firms, each with fewer than 500 employees. The NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council. NAM member companies employ 85 percent of all manufacturing workers and produce more than 80 percent of the nation's manufactured goods. One of the nation's oldest employer associations, the NAM will celebrate its centennial anniversary in 1995.

The proposed legislation, while laudable in its goal of improving international antitrust enforcement, creates some serious risks for U.S.-based companies competing against competitors located abroad. Many of our members do substantial business overseas, and some of the largest multinational business organizations in the world -- with substantial foreign operations -- belong to the NAM. The NAM has a great deal of collective experience about how the antitrust laws are enforced, both in the United States and in various foreign countries. In addition, many of our smaller members could be affected by H.R. 4781 because of the increasingly global nature of the marketplace.

Based on our members' experience in antitrust-related matters both here and abroad, the NAM shares the Justice Department's belief that improved international antitrust enforcement has the potential to benefit U.S. business. American businesses, which purchase and sell enormous quantities of goods abroad, have most probably been victims of foreign cartels in such areas as having to pay above-market prices or in being excluded from certain overseas markets. We also understand that antitrust violations committed abroad are often difficult or impossible to prosecute because of the limitations of U.S. discovery procedures as applied to foreign nationals and companies.

Thus, although NAM members have concerns about the proposed legislation as a solution, there is a consensus that the association should not actively oppose the proposal as written. The NAM appreciates that significant changes were made from the draft that was originally circulated -- the most important being the exclusion of Hart-Scott-Rodino filings.

Nevertheless, important issues remain that Congress needs to address before final consideration of H.R. 4781, including how to ensure that U.S. constitutional rights and privileges are met while dealing with foreign antitrust enforcement agencies. The NAM hopes that you and the Department of Justice will consider these comments as constructive criticism and that the committee will make appropriate changes to the legislative language.

On its face, the solution proposed by the International Antitrust Enforcement Assistance Act of 1994 is necessarily backward -- dealing with foreign cartels by subjecting U.S. firms to discovery at the request of foreign governments investigating violations of foreign antitrust laws. The Department of Justice contends that offering up U.S. firms for discovery related to prosecution under foreign laws will thereby encourage foreign governments to offer up their own nationals and businesses for prosecution in the United States. It is by no means certain or obvious, however, that offering up domestic firms for foreign investigation and prosecution (under "antitrust laws" abroad which are sometimes in conflict with our own) will have any reciprocal effect at all. Moreover, the "currency" being offered to encourage reciprocity by foreign antitrust enforcement authorities are often confidential business documents of U.S. companies. Thus, the proposed legislation is a risk -- calculated though it may be -- falling squarely on the shoulders of American business, by placing confidential documents in potential jeopardy of disclosure to foreign competitors. In many instances, these competitors have a relationship with foreign governments much closer than exists between business and government in the United States. Indeed, in some cases the competitor and government may be one and the same.

To minimize the risks involved for U.S. business, H.R. 4781 should, first and foremost, affirmatively provide for (rather than expressly negate) the opportunity for judicial review of the attorney general's decision to turn confidential and proprietary business information collected from U.S. firms over to foreign antitrust enforcement authorities. The NAM urges Congress to grant as much protection as possible for this information, which can be highly sensitive in antitrust investigations. These investigations often include requests for documents such as future product plans, new technologies and marketing strategies. Specifically, the NAM suggests eliminating the bar to judicial review contained in Section 9(a). Instead, the attorney general should be required to give reasonable notice of an intent to disclose evidence to foreign antitrust officials. Such advance notice would describe the antitrust evidence to be disclosed, identify the foreign antitrust authority, and give the proposed date of disclosure.

Thereafter, the affected U.S. companies should be allowed to object promptly in writing to the proposed disclosure. After receiving the written objection, the attorney general then would be required to apply to the district court in which the objector resides prior to sharing the materials in question. Before releasing the information, that court would then be asked to find that: 1) the proposed disclosure does not violate the terms of the proposed International Antitrust Enforcement Assistance Act, and 2) the interests of the United States in disclosing antitrust evidence outweigh the confidentiality concerns of the affected U.S. firm, taking into account such factors as the risk of unauthorized disclosure by the foreign antitrust authority, the relevance of the evidence to the foreign antitrust violation

alleged, the extent to which such foreign laws may differ or conflict with U.S. antitrust policy, and whether the foreign state has a proprietary interest that could benefit from disclosure of the confidential information sought from the affected businesses.

Some form of judicial review apparently is contemplated under the proposed legislation for the collection of new evidence from U.S. companies, for which the attorney general is required to apply to the district courts for an order authorizing discovery at the behest of the foreign antitrust authority. Information collected by U.S. antitrust agencies in all other contexts (save information provided pursuant to the Hart-Scott-Rodino Act premerger notification process or specified grand jury materials), however, is subject to no judicial review at all. Antitrust evidence collected by U.S. authorities for purposes other than at the request of foreign governments should be entitled to at least the same judicial protections afforded when new antitrust evidence is sought at the request of a foreign government.

H.R. 4781 also provides that discovery ordered by U.S. district courts at the request of foreign antitrust authorities "may be in whole or in part the practice and procedure of the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority with respect to which the [a]ttorney [g]eneral requests such order." Section 4(b)(2). U.S. discovery procedures are the most generous and sophisticated in the world, providing for the taking of testimony under oath, requests for documents of sometimes enormous scope, and information provided in response to written questions.

These procedures are well known to U.S. government lawyers, the private bar and the federal judicial system. In contrast, neither the courts, nor the government, nor the private bar are expert in foreign discovery procedures and the imposition of those procedures on antitrust discovery here can only lead to confusion, as well as unnecessary confrontation and complexity. All discovery under the International Antitrust Enforcement Assistance Act should be conducted pursuant to U.S. discovery rules and procedures.

Similarly, a major constitutional issue arises for when a potential defendant waives his or her Fifth Amendment rights in exchange for immunity from U.S. prosecution. The person's statements or testimony, however, may then become the basis for prosecution by foreign authorities. At a minimum, United States residents who have waived their constitutional rights in order to assist the Department of Justice in a prosecution should be protected from having the Department then aid a foreign antitrust authority in its investigation and/or prosecution of the individual.

In order to allay confusion, the International Antitrust Enforcement Assistance Act should also expressly provide that foreign antitrust laws sought to be enforced under mutual agreements are consistent with U.S. antitrust laws. For example, many mergers and acquisitions are premised, from both a business and antitrust law viewpoint, on the realization of economic efficiencies that result from elimination of duplicate or inefficient production facilities. Foreign laws prohibiting or inhibiting plant closings should not be

enforced through the back door under the proposed legislation, to the detriment of economic efficiencies that would be viewed as pro-competitive under U.S. law.

Some foreign antitrust enforcement authorities also prohibit or frown on beneficial exchanges or publication of information generally recognized to enhance the competitiveness of U.S. business. For instance, "benchmarking" of the best competitive practices is commonplace here, and has resulted in substantial increases in the productivity of U.S. business. Production and sales data are also reported by trade associations or in various media, and permit U.S. firms to more accurately assess supply and demand for their products in various geographic markets. It would be a real economic step backward for the U.S. economy if exchanges of information and ideas that are recognized as both lawful and beneficial here were to be subjected to attack abroad with the active assistance of U.S. antitrust enforcement personnel.

The NAM is particularly concerned that the International Antitrust Enforcement Assistance Act authorizes U.S. officials to assist foreign authorities in investigating conduct that does not violate U.S. law. In fact, this license is in conflict with the spirit if not the letter of several United States statutes, including the Export Trading Company Act, the Webb-Pomerene Act, the Foreign Trade Antitrust Improvements Act, as well as the National Cooperative Production Amendments of 1993 and the National Cooperative Research Act. The Export Trading Company Act and the Webb-Pomerene Act exempt companies from U.S. antitrust laws in the course of making agreements regarding exports. The Foreign

Trade Antitrust Improvements Act likewise exempt domestic companies from U.S. antitrust laws with respect to exports that do not have a substantial impact on the domestic economy. Finally, the National Cooperative Production Amendments of 1993 and the National Cooperative Research Act limit exposure in private antitrust lawsuits to actual damages so long as U.S. antitrust authorities have approved the joint research and/or production venture as consistent with domestic antitrust laws. Various federal agencies are involved in the administration of these statutes, the enforcement and procedures of which involve highly sensitive proprietary data. A provision should be added to clarify that information involved in agreements authorized under H.R. 4781 excludes the administration of these and any other statutes that may conflict with foreign antitrust laws.

Finally, Section 12(7) needs to clarify what types of foreign laws, regulations or conduct are "similar" to the antitrust laws of the United States. For instance, "unfair competition" may be incorporated in the laws of many countries and integrated economic markets, but definitions and interpretations of the term could vary widely depending on the history and culture of the entity.

These comments notwithstanding, the NAM would like to reiterate that it is not disposed to oppose the International Antitrust Enforcement Assistance Act as introduced. Our membership hopes, however, that the concerns are dealt with and that H.R. 4781 is amended to provide better assurance that any resulting exchanges of business information between U.S. and foreign antitrust enforcement authorities do not compromise the

confidentiality protections afforded by current U.S. laws nor undermine protections provided to U.S. residents under the Constitution.

The National Association of Manufacturers appreciates the opportunity to offer these comments. Please let us know if there are any questions.